IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 595

SWIFT AND COMPANY, et al.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *et al.*,

Appellees.

BRIEF OF RAILROAD INTERVENERS

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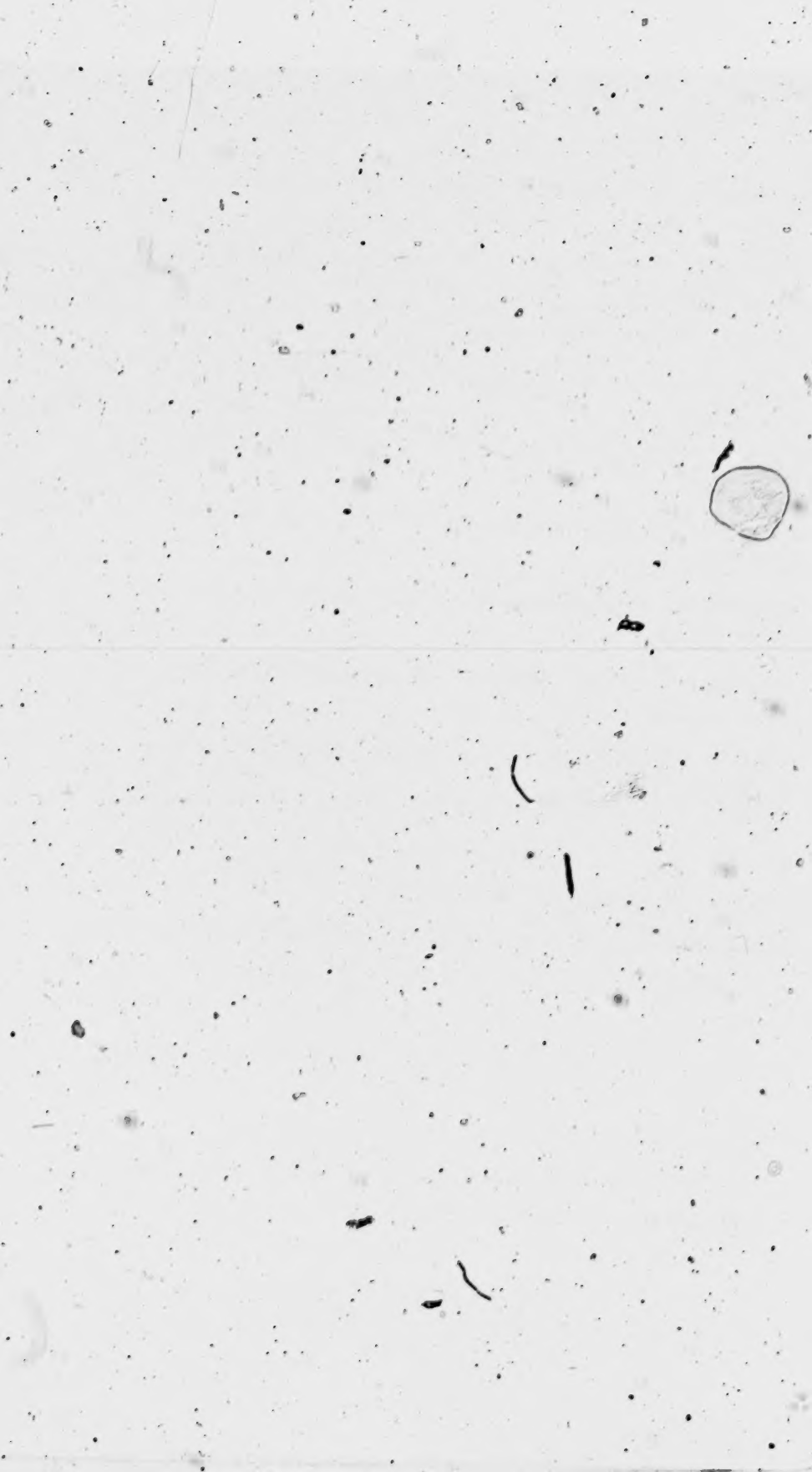

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THE OPINIONS BELOW.

The report of the Interstate Commerce Commission appears in the record at pages 34–57. The decision is published as No. 27862, *Swift & Co.* v. *Alton R. Co.*, 238 I. C. C. 179.

The findings of fact, conclusions of law, and decree of the District Court dismissing the complaint appear at pages 90–98 of the record. No opinion was filed by the District Court.

PRELIMINARY STATEMENT

These interveners, defendants in the proceeding before the Interstate Commerce Commission, are fifteen trunk line railroads serving the City of Chicago. The sole issue involves services and facilities furnished by The Union Stock Yard and

Transit Company of Chicago, but Swift did not name that company as a defendant.

The question before the Commission was whether the transportation service on livestock which a packer consigns to itself at the public stockyards in Chicago, ends with the unloading of the animals into pens in the stockyards or continues through the yards to the public streets beyond, and thus ends only when the animals have been moved out of the yards to which they are consigned.[1] To determine this question the Commission conducted a comprehensive investigation of the facts. In *Armour* v. *Alton Railroad Co.*, 312 U. S. 195 (decided February 15, 1941), which we shall call "the *Armour* case," reference is made to the hearings conducted by the Commission in this proceeding as follows:

> "The complexities of the situation here presented are graphically illustrated in the companion case of Swift & Co. v. Alton R. Co., 238 I. C. C. 179. Swift, one of Armour's competitors, took its petition for alteration of the same long-standing practice directly to the Commission. That expert body found it a necessary prerequisite to decision to have a trial examiner conduct extensive hearings, compiling in the process a record of 5 volumes, 1,147 pages, and numerous exhibits." (p. 202)

The record which the Court thus described was compiled in the course of five hearings. A proposed report was issued, extensive briefs were submitted, and the matter was argued to the entire Commission. The Commission found:

> "We find that the transportation of direct shipments of livestock consigned to complainant at the Union Stockyards in Chicago, Ill., ends when the livestock has been unloaded into the unloading pens at the Union Stock Yards. We further find that the yardage charges assessed by the Union Stock Yards and Transit Company of Chicago on direct shipments of livestock, as defined in this

[1] For several years Swift has been receiving its livestock at its own stockyards in Chicago and not at the public yard.

respect, transported to the Union Stock Yards, for services performed and facilities used beyond the gates leading from the pens in the stockyards into which the livestock is unloaded from railroad cars, are not subject to our jurisdiction.

"We further find that defendants' failure to afford egress for shipments of livestock described in the preceding paragraph free from the payment of yardage charges has not resulted and does not result in an unreasonable practice.

"The complaint will be dismissed." (R. 55)

The "alleged errors in the decision of the Commission" are stated on page 10 of appellant's brief. That statement contains no charge that the Commission's findings are not supported by the evidence; no question is raised as to the existence of "the basic prerequisites of proof."[1] The attack upon the conclusion of the Commission is that it rests upon a misconstruction of the Interstate Commerce Act, and that rightly construed, that statute compels, as a matter of law, the different conclusion sought by Swift. This was also the contention of Armour, which argued that its complaint raised a pure question of law to be determined not by the Commission, but by the courts. This Court held:

> "At what point did the common carrier's duty to transport come to an end? *Neither the statute nor any applicable principle of governing law* can be said to mark this boundary; under all circumstances and conditions and in all cases." *Armour* v. *Alton Railroad Co.*, 312 U. S. 195, 200.[2]

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[1] "Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable." *Rochester Tel. Corp.* v. *U. S.*, *307 U. S. 125, 139, 140.*

[2] All italics in quotations are added unless otherwise stated.

Paying lip service to that holding of the Court, appellant states: "it is only too well settled that the duty of a carrier as to delivery may vary, dependent upon the conditions relating to the particular traffic." (Swift's brief, p. 85) The Commission, upon an extensive investigation and a complete record, has now marked the "boundary" of the carriers' duty in respect to this "particular traffic." Nevertheless, Swift's whole argument is not an attack upon the factual basis of that finding,[1] but is an effort to show that the Commission's conclusion is forbidden by "the statute" or some "applicable principle of law." The very contention overruled in the *Armour* case was that the question was one of law which the court should determine by reading the statute. Swift, having gone to the Commission and received an adverse ruling, now repeats the contention advanced in this Court by Armour only last year, that the words of the statute leave no latitude for the exercise of an administrative judgment, that they compel the conclusion desired by Swift and forbid any other. Every provision of the statute, and every case which was relied upon by Armour to show that the issue was one of law for decision by the courts, are now relied upon by Swift as compelling a finding that, as a matter of law, transportation of this livestock does not end at the unloading pens in the yard to which it is consigned, but in the public streets surrounding the yard. This position is squarely opposed to the decision in the *Armour* case, *supra*.

Since Swift does not deny that it has had a fair hearing before the Commission, or assert that the findings of the Commission are inadequate, or that the findings made are without support in the evidence, it would be sufficient, no doubt, to show the Court that the sole contention upon which this appeal rests is that the issue here is solely one of law, exactly the contention which was overruled in the Armour case.[1] However, in the *Armour* case the Court had before it only the complaint, the

[1] See appellant's "Statement of the Case," its brief, p. 4.

allegations of which were more favorable to the packers than the facts warrant, and moreover, the complaint ignored many material facts of great importance which are opposed to the packers' contentions. For these reasons we include in this brief a review of the findings of the Commission and of the extensive evidence before it. In the interest of accuracy, we deem it proper also to include a discussion of certain subjects which are incorrectly treated in the packers' briefs, although it is believed that they relate to considerations which have little, if any, bearing upon this review of the Commission's report.

Statement of the Case

We desire to supplement appellant's statement of the case.

At all times since the beginning of its operations in 1865 The Union Stock Yard and Transit Company has assessed and collected from all shippers, including the packers, a uniform yardage charge which is assessed upon all livestock received at the yard. Evidence which came to the attention of the Commission for the first time in this proceeding shows that for many years, Swift, as a partner in the stockyard enterprise, had a large financial interest in the earnings of the Yard Company and participated in the imposition of the charge of which it now complains. (R. 45)

For the last 20 years, pursuant to the requirements of the Packers and Stockyards Act, 1921, the Yard Company has filed its schedule of yardage charges with the Secretary of Agriculture. The current tariff "U. S. Y. & T. Co. No. 11" (Ex. 67) provides:

"SCHEDULE OF CHARGES

YARDAGE CHARGES:

THE FOLLOWING YARDAGE CHARGES WILL BE MADE ON ALL LIVESTOCK RECEIVED[1] AT THESE YARDS:

Cattle	45¢ per head
Calves (400 lbs. or under)	35c per head
Hogs	15c per head
Sheep and/or goats	10c per head
Horses and Mules	50c per head"

[1] It will be noted that in express terms the tariff levies the published charges "on all livestock *received* at these yards." In the so-called *Hygrade* case (*Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 295 U. S. 193) which presented the same question as that involved here, namely whether transportation to the Chicago Union Stock Yards ends at the unloading chutes or at some point beyond, the Court, commenting upon the practice at this yard, said:

> "Paragraph (5) of §15 was passed February 28, 1920, during and presumably with knowledge of the controversy later brought here in *Adams* v. *Mills*, *supra*. While declaring that transportation of livestock to public stockyards shall include unloading without extra charge, it left undisturbed the Yards Company's practice of making a charge for livestock *received*. The Packers and Stockyards Act, approved August 15, 1921, subjects public stockyards to regulation by the Secretary of Agriculture. Section 301 (b) defines stockyards services to include, among other things, facilities furnished at a stockyard in connection with the *receiving*, holding and *delivery* of livestock." (pp. 199–200)

It will be seen that the Yard Company's charge is explicitly imposed upon livestock "*received*," that this Court held that the amendment to Section 15(5) of the Interstate Commerce Act "left undisturbed the Yard Company's practice of making a charge for livestock *received*" and, in that connection, pointed to the language of the Packers and Stockyards Act which subjects "stockyards services" to the jurisdiction of the Secretary of Agriculture, and specifically defines such service to include "facilities furnished at a stockyard in connection with the *receiving*, holding and *delivery* of livestock."

In 1933, Swift and Armour made joint and identical demands upon the defendants that the practice as to the delivery of livestock at the Union Stock Yards, which had been maintained without interruption since 1865, be changed in respect to their shipments to that yard. It is admitted by Swift here (as it was by Armour in the *Armour* case) that through all the years down to the time of their joint demand in 1933, the transportation service on livestock consigned to the public stockyards, and the responsibility of the carriers therefor, ended with the unloading of the stock into the pens in the yard. (R. 45; Swift's brief, pp. 68, 69) Nevertheless, the demand of the packers in 1933 was that the long standing practice be changed and that the transportation service on livestock consigned to the yard be thereafter deemed to extend beyond the unloading pens to the public streets surrounding the yard, and thus to embrace also services and facilities furnished by the Yard Company under its tariff filed with the Secretary of Agriculture.

By these demands the packers sought to obtain preferential treatment as against the livestock producers. The direct shipments of the packers are not purchased through the competitive processes of the public market conducted at the Union Stock Yards, but at points in the country and on the farms. The Stock Yards Company has always collected a uniform yardage charge on every animal unloaded on its premises, whether the shipments were direct shipments to a packer or shipments to a commission merchant for sale. As a result of an increase in the *unloading charge* by the Yard Company, without sanction of the Commission, the producers secured the enactment of Section 15(5) to guarantee the performance of the unloading service without extra charge, but the producers have never complained against the yardage charge. In its decision herein the Commission, referring to the producers' attack upon the unloading charges in the controversy later settled in *Adams v. Mills*, 286 U. S. 397 (1932), said:

"The producers did not complain against the yardage charge they were then paying, nor have they ever complained against the assessment of that charge. It is significant that at that time the producers were concerned actively with the question of where transportation should be held to end, both by opposing the assessment of an additional charge for unloading and by advocating the amendment to section 15, subsequently enacted."

* * * * *

"No complaint has ever been made by the producers who sponsored the amendment regarding the payment of the yardage charge." (R. 50–52)

The packers' contention that on their own direct shipments transportation does not end with the unloading and that they should be furnished the services and facilities of the Stock Yards Company on such shipments free of the obligation to pay the yardage charge is advanced for the purpose of obtaining preferred treatment for their direct shipments at the expense of the producers whose stock is shipped to the stockyards for sale on the public market. The record shows that existing advantages to the packers in purchasing livestock on the farm, rather than competitively upon the market, is such that the increase in direct shipments has been tremendous. (R. 53)

Following their joint demands, Swift filed a complaint with the Commission alleging that the Yard Company's imposition of a yardage charge upon its shipments constitutes an "unreasonable practice" by the defendant trunk line carriers in violation of Section 1 of the Interstate Commerce Act. (R. 24, 32). Armour filed a petition of intervention in the proceeding before the Commission alleging that it had instituted a suit in court against the trunk lines on the same cause of action. (R. 36, 124)

Armour's case was dismissed by the Federal District Court (27 F. Supp. 625) which held that "this case seems to me to come squarely within the rule laid down" (p. 629) by the Supreme Court speaking through Mr. Justice Brandeis in

Great Northern Railway Company, et al v. *Merchants Elevator Co.*, 259 U. S. 285 in which this Court said "resort to the Commission is required" when "the inquiry is essentially one of fact and of discretion in technical matters." The Circuit Court of Appeals reached the same conclusion (111 F. (2) 913), and, as stated above, this Court affirmed February 3, 1941. *Armour and Co.* v. *Alton R. R., et al.*, 312 U. S. 195.

Notwithstanding the fact (as the Commission has found, R. 37) that the complaint is directed at a "yardage charge . . . assessed, collected, and retained by the Yard Company, under authority of a tariff filed by that company with the Secretary of Agriculture," neither Swift nor Armour has ever made any effort to secure an adjustment of those charges from the Secretary of Agriculture. Not only have they refrained from making any direct attack on the Yard Company's charges, but they refrained also from making the Yard Company a defendant in this proceeding, regardless of the fact that the services in question must be performed by the Yard Company and upon the property of the Yard Company, over which, of course, the trunk line carriers have no control.

The unwillingness of the packers to join issue with the Yard Company respecting a charge paid to the Yard Company for services performed by the Yard Company is made more marked by Swift's admission that it is not paying, and has never paid the trunk lines for the services in question. The appellant states:

> "The prayer of the complaint was in substance amended at the hearing before the Commission. Throughout the hearing before the Commission appellants expressed their willingness to pay whatever the Commission might consider reasonable for egress, in addition to the line-haul rate to the unloading pens . . ." (Swift's brief, p. 3)

Swift's change in position, to which it here refers, occurred during the hearings before the Commission, after it was proved

beyond question, as the Commission has now found, that the transportation rates which the Commission had itself prescribed on livestock consigned to the public stockyards at Chicago were not intended to, and do not, compensate the carriers for any services or facilities beyond the unloading pens. The rates were so made by the Commission because the carriers had never furnished any service beyond the unloading and it had always been recognized by everyone that the transportation services ended with the unloading. The Commission found:

> "The line-haul carriers have never performed services on direct shipments of livestock transported to the Union Stock Yards after it is unloaded. They have no voice in the nature of the yard services provided or in the manner in which they are performed. They have never been compensated for any services performed at the stockyards after the placement of the animals in the unloading pens. The rates applicable on livestock transported to the stockyards do not include any allowance to cover yardage services." (R. 45)

Swift now concedes that it is receiving from the carriers all of the services for which it is paying the carriers, and recognizes that it must pay a charge in addition to the transportation rate for the service here in question, as in fact it has done on its every shipment to the yard since 1865. For 20 years the reasonableness of the charge for that service has been subject to Federal regulation through the jurisdiction of the Secretary of Agriculture.[1] Neither Swift nor Armour has ever invoked that jurisdiction. Why, it may be asked, has each of these packers now carried a case against the trunk lines to this Court in an effort to avoid any issue with the Yard Company whose charge it assails? The answer is to be found in the history of this yardage charge.

One of the incidents of the historic relationship between the packers and the Yard Company was an agreement by Swift,

[1] The Secretary has repeatedly exercised this jurisdiction and, as the Commission has found, this Court has sustained him in so doing. (R. 53–54) We discuss this *infra* pp. 88 to 92.

Armour, and the other Chicago packers with the Union Stock Yard and Transit Company "that as long as the Yard Company conducted its business at Chicago they would not interest themselves in any other stockyards in Chicago for the receipt and use of their livestock." (R. 43; Ex. 47, pp. 13, 14). Notwithstanding that agreement, Swift, for some years, has been receiving its direct shipments not at the yard of the Union Stock Yard and Transit Co., but at its own yard in Chicago. Under these circumstances Swift has not found it expedient to make any direct attack upon the Yard Company's charge. As to Armour, it is a matter of common knowledge that that company and the Yard Company are under the common control of Mr. Frederick H. Prince.[1]

It has been pointed out that the Yard Company's historic charge, published in tariff form since 1921, is a uniform charge applying on all livestock *received*. Swift states that it does not desire all of the services and facilities which are available to it upon payment of that charge, and strongly implies, although it nowhere specifically states, that the uniform yardage charge imposed by the Yard Company is too high for application to the services desired by it.[2] The situation therefore is this: conceding that it must pay someone for the additional services which it requires, and that it is not paying for these

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[1] The Commission, finding that the transportation service ends with the unloading of the stock, and that the assailed practice is reasonable and lawful, deemed it unnecessary to pass upon the trunk lines' contention that the Yard Company was an indispensable party to this proceeding.

[2] It is clear from their whole attitude in these proceedings, that neither Swift nor Armour would suggest that the Yard Company's total receipts from the uniform yardage charge are excessive. Their theory, presumably, is that the yardage charge should not be of a uniform or blanket character, that the charge for services performed on their own shipments should be less than the amount now assessed and, if necessary, that the charge on the producers' stock should be increased.

services in the transportation rate assessed by the carriers, Swift, while implying that its payment to the Yard Company is excessive, has never sought to force the Yard Company to reduce it by invoking the processes of the Packers and Stockyards Act, now in existence for more than twenty years. We believe, as stated above, that the explanation for this strange conduct must be found in the history of the yardage charge and the relations between the packers and the Yard Company in respect thereto.

Before proceeding to the argument, we direct attention to certain additional findings of the Commission as follows:

> "Since 1865, when the Yard Company began operations, there has been a line of demarcation between the services which shippers were entitled to receive for the transportation charges and the services received from the operator of the stockyards. The line-haul carriers pay the Yard Company for the unloading service and absorb the charge made for such service out of their line-haul rates. From the beginning, all shippers were required to pay to the Yard Company a yardage charge on every animal unloaded at the yards. The amounts of these charges were determined solely by the Yard Company, the services and facilities were furnished solely by the Yard Company, and the dealings with respect to the yardage charges were solely between the Yard Company and the shippers." (R. 42)

* * * * *

> "The evidence shows that for more than 70 years, under the usage and practice at the Union Stock Yards, the responsibility of the railroads in respect of direct shipments of livestock consigned to said yards has ended with the unloading service, and that by affirmative action, beginning about 1890 and continuing for many years, the packers, including complainant and intervener, insisted that the performance of the yardage service upon their shipments was a private matter between themselves and the Yard Company, unaffected by the tariffs covering the transportation charges of the railroads." (R. 45)

* * * * *

"For many years the packers, including complainant, made the practice of which they now complain their own practice. They gave up their own terminal facilities at the Central Stock Yards for a substantial consideration, and, by their own covenants with the Yard Company, made the Union Stock Yards their own terminal facilities in Chicago." (R. 46)

On Swift's complaint praying that the order of the Commission be set aside and annulled, the District Court, after due hearing, found:

"1. The findings made by the Commission are adequate to support its conclusion that the transportation of direct shipments of livestock to the Union Stock Yards at Chicago is completed when the livestock is placed in the unloading pens, and that yardage charges assessed by the Stock Yards Company for services performed, and facilities used beyond the gates leading from the pens in the stock yards, into which the livestock is unloaded from railroad cars, is not subject to the jurisdiction of the Commission, and that the failure of the railroad defendants to afford egress for direct shipments of livestock transported to the Union Stock Yards did not result in an unreasonable practice.

"2. The Commission had evidence before it sufficient to sustain its findings." (R. 96–97)

Pursuant to these conclusions of law the court entered its decree dismissing the complaint. (R. 97–98)

PROPOSITIONS RELIED UPON BY THE RAILROAD INTERVENERS

The railroad interveners rely upon two primary propositions as follows:

(1) **"Neither the statute nor any applicable principle of governing law"[1] is determinative of the question raised by the complaint because that question is one of an administrative nature requiring determination by the Interstate Commerce Commission, and the appellant has had a**

[1] The language of the Court in the *Armour* case, p. 3, *supra*.

full and fair hearing before the Commission on that question.

(2) The evidence supports the finding of the Commission upon the administrative issue before it, that "the transportation of direct shipments of livestock consigned to complainant at the Union Stockyards in Chicago, Ill., ends when the livestock has been unloaded into the unloading pens at the Union Stock Yards." (R. 55)

To bring to the attention of the Court at the outset the "circumstances and conditions"[1] which the Commission found decisive here, we discuss in reverse order the two propositions just stated. A complete reference to the record before the Commission and the Commission's findings thereon will be necessary in the course of the argument which follows, and to avoid duplication a more detailed statement of the evidence and findings is not made here.

SUMMARY OF ARGUMENT

The evidence supports the finding of the Commission that "the transportation of livestock consigned to complainant at the Union Stock Yards in Chicago, Ill., ends when the livestock has been unloaded into the unloading pens at the Union Stock Yards," (R. 55) and that the practice complained of is not unreasonable.

The yardage charge of the Yard Company is assessed only on shipments consigned to the Union Stock Yards. Swift is not consigning its shipments to those yards, and is not paying the yardage charge of which it complains. It, like the other packers at Chicago, has the choice of a number of alternatives in determining where it will receive its shipments at Chicago.

The Yard Company's charge on direct shipments which is the subject of the attack is one which it has assessed since its origin in 1865, and which the packers paid without protest until

[1] The language of the Court in the *Armour* case, p. 3, *supra*.

1933. In 1891 the packers at Chicago, both large and small, insisted that the yardage charge on their direct shipments was a subject for negotiation and bargaining with the Yard Company, and one with which the railroads had no concern. Swift, Armour and their associates built their own stockyards, the Central Stock Yards, to receive their direct shipments, and the railroads were ready and willing to deliver the direct shipments to that stockyards. The packers, however, gave up the Central Stock Yards when the Yard Company agreed to allow them an interest in its business, participation in the assessment of its yardage charges and a share in the proceeds. Swift and Armour made the practice their own, and "agreed that as long as the Yard Company conducted its business at Chicago they would not interest themselves in any other stockyards in Chicago for the receipt and use of their own livestock." (R. 43)

The evidence shows and the Commission found that the transportation rates which the Commission itself prescribed do not compensate the carriers for any service performed after the placement of the animals in the unloading pens. The carriers have no control over such services or of any facilities in the yards beyond those pens.

After the passage in 1906 of Section 1 (3) of the Interstate Commerce Act in its present form, the packers not only made no protest against the assessment of the yardage charge on their direct shipments but sought a renewal of the arrangement by which they would continue to participate with the Yard Company in the assessment and proceeds of the charge.

The Supreme Court in 1912 ordered the Yard Company to file with the Commission its charges for transportation services. Pursuant to the order, the Company filed a tariff which did not contain the yardage charge. Instead of protesting this, the packers continued to pay the charge on direct shipments as a charge for stockyards services, and to seek another bargain with the Yard Company for a share in the proceeds of the charge.

Swift was a party to the Commission's investigation of the transportation activities of the Yard Company after the Company cancelled its I. C. C. tariff in 1917, but made no suggestion that the yardage charge which it was paying on direct shipments was a transportation charge, either during the investigation or after the Yard Company had re-filed its tariff. 52 I.C.C. 209; 58 I.C.C. 164.

After the enactment of Section 15(5) in 1920, the Yard Company continued, as before, to collect its yardage charge on all direct shipments, with no claim from the packers, who continued to pay the charge, that the section could be construed as forbidding its collection. Swift expressly concedes in this proceeding that there is no support for its complaint in Section 15(5). The legislative history of that section demonstrates that Congress recognized the understanding of all parties that the obligations of the railroads do not extend beyond the unloading pens.

In 1921 the Packers and Stockyards Act was passed. Consistently with the Act's definition of stockyards services as including "receiving" of livestock, the Yard Company filed with the Secretary of Agriculture a tariff of charges for stockyards services, which included the yardage charge on direct shipments. There was no protest against the inclusion of this charge in the Yard's tariff covering stockyards services, just as there had been no protest against its exclusion from the tariff covering the Yard's transportation services. Nobody suggested that the Yard Company had misinterpreted the Act, and since 1921 the packers have paid the yardage charge in accordance with that tariff.

In the following years, Swift and Armour not only paid the charge without protest, but caused many other stockyards companies, which they controlled, to assess such charges on all direct shipments. In 1927 they argued to the Commission

that such charges were valid and proper under the statutes, and they were upheld by the Commission.

Not until 1933 did Swift and Armour change their interpretation of the statutes and claim that the long standing practice was unlawful under a section of the Interstate Commerce Act which was enacted in 1906. Four more years elapsed before proceedings were instituted on that demand, and then Armour tried to avoid the jurisdiction of the Commission by its suit in the courts.

The Secretary of Agriculture has asserted jurisdiction over these yardage charges on direct shipments under the Packers and Stockyards Act, 1921. If the charges are unreasonable the packers have a complete remedy by complaint to the Secretary under that Act.

In three cases this Court has held that the question whether a particular service at the Chicago Union Stock Yards was a transportation duty of the carriers is not a pure question of law but is an administrative matter for the decision of the Interstate Commerce Commission, involving such factors as the usage and custom, the history of the service, the physical conditions and the participation of the parties in establishing the practice. *Adams* v. *Mills*, 286 U.S. 397; *Atchison, T. & S. F. Ry.* v. *United States*, 295 U.S. 193; *Armour & Co.* v. *United States*, 312 U.S. 195. Upon a record so convincing that the packers do not attack it as lacking the necessary prerequisites of proof, the Commission has determined that the practice is one which the packers have made their own and that it is not an unreasonable practice. We submit that the packers' argument that the Commission, as a matter of law, had no right under the statute to reach that decision is unsound and has already been rejected by this Court.

ARGUMENT

Foreword

In its decision in the *Armour* case the Court said:

> "The complexities of the situation here presented are graphically illustrated in the companion case of Swift & Co. v. Alton R. R., 238 I. C. C. 179 . . . "
>
> "The principles making up the so-called primary jurisdiction doctrine are well settled. This is obviously a case for their application. The decision below is accordingly affirmed." (312 U.S. at p. 202)

The Commission has now decided the question which the Court held to be for the determination of "that expert body." Although the adequacy of the evidence to support the Commission's findings is not controverted, the Court will desire to satisfy itself that "the basic prerequisites of proof"[1] have been met. Before discussing the evidence, however, we wish to comment briefly upon the attitude of Swift, the appellant, and Armour, intervener, toward the decision of the Court in the *Armour* case, as displayed in their briefs herein.

The Commission, passing upon the question which this Court held that the Commission must decide, found that the transportation service ends with the unloading and, *therefore*, that the services and facilities furnished by the Yard Company within the yard after the completion of the unloading are, of necessity, outside its jurisdiction. Plainly, this was an inescapable corollary of the Commission's determination of the administrative question before it. To hold that transportation ends with the unloading and, consequently, that services beyond that point are outside the Commission's jurisdiction, are but opposite sides of the same coin. Swift's effort to distort the meaning and significance of the decision of the *Armour* case and that of the Commission in this case has taken an extraordinary form. We quote without further comment from appellant's brief (p. 25) as follows:

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[1] *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 140.

> "The Commission finds that it has no jurisdiction of the charges here involved for the access 'which must be purchased' (p. 197 of Commission's decision, R. p. 55). To the contrary this court in the recent decision in *Armour & Co.* v. *Alton R. Co.*, 312 U. S. 195, 85 L. ed. 771, holds that the Commission is the only tribunal which has jurisdiction * * *" (p. 25, see also to same effect pp. 18, 84–90)

The brief of Armour as intervener herein, assumes throughout, for the purpose of the argument, that the Commission's "every finding of fact made is supported by substantial evidence; that the evidence requires no findings which were not made, and that each finding of the Commission has been found by this Court to be true, correct and adequately supported by the evidence." (Armour's brief, January 27, 1942, pp. 1, 2) Proceeding on that assumption, Armour's whole argument, like Swift's, is an effort to impeach the decision of this Court in the *Armour* case. Both argue that the statute and applicable principles of governing law mark the boundary of the transportation service, whereas this Court held that "neither the statute nor any applicable principle of governing law can be said to mark this boundary." *Armour & Co.* v. *Alton R.R.*, 312 U. S. 195, 200. Counsel for Armour have accomplished the feat of arguing this question throughout the 47 pages of its brief without so much as a single reference to the decision of this Court one year ago in its own case which it now seeks to overturn. It is difficult to say whether Swift's or Armour's method of dealing with the Court's decision in that case is the more astonishing.

I.

THE EVIDENCE SUPPORTS THE FINDING OF THE COMMISSION THAT "THE TRANSPORTATION OF LIVESTOCK CONSIGNED TO COMPLAINANT AT THE UNION STOCK YARDS IN CHICAGO, ILL., ENDS WHEN THE LIVESTOCK HAS BEEN UNLOADED INTO THE UNLOADING PENS AT THE UNION STOCK YARDS." (R. 55)

The searching investigation conducted by the Commission in this proceeding developed a great volume of factual data which was never before the Commission previously, either in the so-called *Hygrade* case[1] or in any other proceeding. These facts showed, among other things, the actual use being made of the facilities available for the receipt of livestock in Chicago, other than those at the Union Stock Yards, and the adequacy of these facilities including the public delivery tracks used by the small packers and the use by Swift of its own receiving yard; they showed in great detail the vital facts which make up the history of the yardage charge at the public yard, and the relations between the Yard Company, Swift, and Armour in respect to that charge.

A. SWIFT HAS THE CHOICE OF A NUMBER OF ALTERNATIVES IN DETERMINING WHERE IT WILL RECEIVE THE LIVESTOCK CONSIGNED TO IT AT CHICAGO.

Those shipping livestock to Chicago have the choice of consigning it to the Union Stock Yards and having the unloading service performed without extra charge,[2] but subject to the

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[1] *Atchison, T. & S. F. Ry.* v. *United States*, 295 U. S. 193 (1935).

[2] Section 15(5) of the Interstate Commerce Act, Part I, provides in part as follows:

> "Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include * * delivery at public stockyards of inbound shipments into suitable pens, * *."

Yard Company's yardage charge, or of taking delivery at other points in the Chicago area and unloading the cars themselves, free from the imposition of any yardage charge. These choices as shown by the evidence are as follows:

1. The team tracks of all of the trunk lines are available for the delivery of livestock and are constantly used for that purpose. Hundreds of cars of stock, consigned principally to the small packers, are annually received and unloaded there. (Ex. 21) The animals pass from the car directly into trucks. The consignees themselves unload the cars consigned to these tracks, just as consignees ordinarily unload other kinds of freight, but delivery is made on the premises of the railroads, and no yardage or other charges are assessed in addition to the line-haul rate. (R. 422–427, 490–491)

Swift criticizes the team track facilities on the ground that they do not include pens. In actual practice the facilities have proved to be fully adequate for the use made of them by those desiring to avoid payment of the Yard Company's yardage charges, who do not have a private stockyard, as does Swift. Livestock is not driven through the streets of the City of Chicago on the hoof. The animals must therefore be removed in trucks. Swift insists that it requires no storage or holding of its livestock but desires immediate removal, so that its criticism of the team track facilities which permit the driving of the animals directly into the trucks, in which they are to be removed (R. 473), was shown to be without merit. The Commission's holding is that the team track facilities "have been found ample." (R. 46)

2. Swift has the choice also, under the tariffs of the trunk lines, of driving its direct shipments into the very doors of its packing plant by ordering delivery on the industry tracks which serve the plant, and paying the applicable switching charges which the Commission has found reasonable for that service.[1] (R. 46, 422–423)

[1] *Hygrade Food Products Corporation* v. *Santa Fe*, 195 I. C. C. 553 (1933).

3. Swift maintains its own private stockyards in the City of Chicago and for the last several years it has received its direct shipments at that yard located upon its own property. Swift pays the flat Chicago rate on its shipments to this yard regardless of where they originate or what line brings them to Chicago, (R. 425) and performs the unloading service at its own expense, its yard not being a public stockyard. The appellant is thus seeking to support its attack on the yardage charge by calling the Union Stock Yards the defendants' livestock terminal at Chicago, although Swift is itself receiving all of its direct shipments at its own yard and is not paying that yardage charge.

4. Finally, Swift may, if it chooses, consign its shipments for unloading at the public yard, upon the premises of the Yard Company. But as shown above, and as the Commission has found, (R. 46) Swift consigns its shipments to the public yard only when it chooses to do so in preference to delivery at some other point in Chicago, just as a shipper may, if he elects to do so, and upon similar conditions, consign certain classes of freight for delivery at a public warehouse rather than upon his own premises, or upon the public team tracks. On shipments consigned to this yard "delivery * * *into suitable pens*"[1] by long custom, and since 1920 by statute,[2] is required to be performed by the carriers without extra charge. On the other hand, such livestock is deliberately consigned for delivery at a public livestock market located on the premises of the company operating the public stockyards, and that company throughout its entire history has assessed a yardage charge on all livestock so received.

5. We direct attention to one further alternative which the packers voluntarily relinquished. Almost fifty years ago, at a time when Swift and the other packers had for many years been receiving their direct shipments at the Union Stock Yards, and

[1] Section 15(5).
[2] Id.

paying thereon to the Yard Company its regular yardage charge, the packers constructed a stockyard of their own, adjacent to their plants, for the purpose of avoiding the payment of the yardage charges. The trunk line carriers were ready and willing to make delivery to the packers' stockyards and sought to do so. Nevertheless, complainant and the other packers, in exchange for substantial payments from the Yard Company and an interest in its business, abandoned their own yards, agreed with the Yard Company never to be concerned in any yard for the receipt of stock at Chicago other than the yards of The Union Stock Yard and Transit Company, and voluntarily continued the practice of receiving their stock at those yards and paying the charges of the Yard Company until Swift, despite that agreement, began to take delivery of its direct shipments at its own yard. The full significance of the facts in respect to the establishment and abandonment by the packers of their own yards is discussed elsewhere in this brief.

The evidence, we submit, fully supports the finding of the Commission, as follows:

> "Under the provisions of the applicable tariffs of individual railroads serving Chicago, the shippers of livestock have the choice either of consigning it to the Union Stock Yards, and having it unloaded there, without extra charge, or of taking delivery on team tracks of the individual railroads at other points in the Chicago district. In the latter case, they unload the cars themselves. Although the facilities available at such team tracks for the unloading of livestock are not extensive, and do not include pens into which the stock may be unloaded, they have been found ample for such shipments as have been placed on such tracks for unloading. Many carloads of livestock, consigned principally to the small packers, are received and unloaded on such tracks. In addition, under the tariffs of the line-haul carriers, the packers, including complainant, may, if they choose, specify delivery of direct shipments on industry tracks serving their plants, by paying the published switching charges in addition to the line-haul rate. More than

one-third of the direct shipments of livestock arriving at Chicago are unloaded at points other than the Union Stock Yards. It appears, therefore, that direct shipments of livestock are unloaded at the Union Stock Yards only when complainant elects to take delivery there." (R. 46)

B. THE CUSTOMARY AND REASONABLE SERVICE WHICH THE SHIPPERS ARE ENTITLED TO RECEIVE FROM THE CARRIERS IN RESPECT TO THIS TRAFFIC HAS BEEN ESTABLISHED BY THE ACTS OF THE PARTIES CONCERNED OVER A LONG PERIOD OF YEARS.

In the latter part of this brief we shall show that in a series of cases, of which the latest is the *Armour* case, this Court has established the rule that the precise limits of the transportation service on livestock consigned to the public yard at Chicago are those which are customary and reasonable, as determined by the Commission.[1]

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[1] In *Adams* v. *Mills*, 286 U. S. 397 (1932), this Court ruled that the question whether the unloading service performed by the Stock Yards Company at the Chicago Union Stock Yards was a part of the transportation service, was a question for the Commission and not for the courts. The question presented by the Swift complaint, and by Armour in its court case, is identical in character with the issue in *Adams* v. *Mills*. There had been preliminary resort to the Commission in that case and the Commission had decided that the unloading was a part of the transportation service and that it was covered by the line-haul rate.

In affirming the decision for the plaintiffs in *Adams* v. *Mills*, the Court, through Mr. Justice Brandeis, said:

> "Whether the unloading in the yards was a part of transportation was not a pure question of law to be determined by merely reading the tariffs. Compare *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 294. The decision of the question was dependent upon the determination of certain facts, including the history of the Stock Yards and their relation to the line-haul carriers; the history of the unloading charge at these yards; and the action of the parties in relation thereto. If there was evidence to sustain the Commission's findings on these matters, its conclusion that the collection of the extra charge from the shippers was an unreasonable and unlawful practice must be sustained." (pp. 409–410)

facts brought to light by an investigation of the Federal Trade Commission which came to the attention of the Commission for the first time in its investigation in this proceeding, permitted the Commission to learn in this case how decisively and how deliberately the custom and practice now assailed was established by the will and purpose of all of the parties in interest.

Throughout a period of approximately 70 years prior to the complainant's recent efforts to change the practice, the packers, the Yard Company, and the railroads, were in agreement that railroad transportation ended with the service of unloading at the Union Stock Yards, and for a substantial part of that period complainant itself participated in the imposition of the yardage charge which it now assails, as a partner of the Yard Company in the stockyard enterprise.

We shall now review the evidence which shows the participation of each of the parties, (a) Swift and the other packers, (b) the Yard Company, and (c) the line-haul carriers, in the usage and custom which, as the Commission has found, operate to end the transportation service at the Union Stock Yards with the unloading of the stock.

C. THE LONG ESTABLISHED CUSTOM AND USAGE OF ENDING TRANSPORTATION OF DIRECT SHIPMENTS WITH THE UNLOADING THEREOF, HAS BEEN ACCEPTED AND PARTICIPATED IN BY SWIFT AND THE OTHER PACKERS, BOTH AS SHIPPERS, AND IN THE CAPACITY OF PARTNERS IN THE STOCKYARDS ENTERPRISE.

With the very beginning of the Yard's operations in 1865 a clear distinction was made between the services which the shippers were entitled to receive for the transportation charges paid the carriers, and the stockyards services received from the operator of the stockyards. Through an arrangement between the trunk line carriers and the Yard Company the latter was compensated out of the through rates for its common carrier service of unloading the cars. The shipper made no extra payment for that service and had no separate arrangement with

the Yard Company with respect to it. On the other hand, from the very beginning, all shippers, including the packers, were required by the Yard Company to pay it a uniform yardage charge on all cattle "received" at the yard, *whether they were consigned to packers and immediately driven out of the yard for slaughter, or whether they were consigned to commission firms for sale in the yards.*[1] (R. 523, 580) The measure of these yardage charges was determined solely by the Yard Company, the services and facilities were furnished solely by the Yard Company, and in respect both to the measure and the payment of the charge, and the performance of the services, the shippers dealt solely with the Yard Company which collected and retained for itself the entire yardage charge. (R. 523) A practical line of demarcation was thus drawn between the services paid for by the transportation rate, and those paid for as stockyards services, which was brought home to the shipper in every transaction in a way that made it impossible for him to misunderstand. This practice had been firmly established for approximately 25 years when, about 1890, complainant and the other packers, by virtue of transactions now to be discussed, became, in effect, partners of the Yard Company in respect to the performance of the yardage services, the assessment of the charge therefor and participation in the earnings accruing from those services.

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[1] Swift seeks to make some point of the fact that it does not now call upon the Yard Company for a weighing service for the yardage charge which it pays on its direct shipments. (Brief, p. 67). But neither did it do so during all the years when it was bargaining with the Yard Company over the yardage charge and actually participating in the assessment of the charge as a partner in the Yard Company's business. From the beginning of its operations, and for over fifty years the Yard Company did not weigh the packers' direct shipments. (Ex. 61, pp. 221–223). In recent years some of the shipments have been weighed and some have not. (R. 553–556).

D. IN 1892 THE PACKERS ACQUIRED AN INTEREST IN THE YARD COMPANY AND PARTICIPATED WITH IT IN THE IMPOSITION OF A YARDAGE CHARGE ON DIRECT SHIPMENTS AND IN THE EARNINGS ACCRUING FROM THE YARDAGE SERVICE. IN RETURN, THE PACKERS ABANDONED THEIR OWN TERMINAL FACILITIES, AND AGREED NEVER TO RECEIVE LIVESTOCK AT ANY POINT IN CHICAGO OTHER THAN THE UNION STOCK YARDS:

After the packers had paid the Yard Company substantial amounts for yardage on their direct shipments for a period of some 25 years, Armour and Swift decided about 1890 that their patronage in respect to these yardage services was something that they should sell rather than give to the Yard Company. Accordingly, they formed a purpose to make use of this patronage, and the power it gave them, to demand and to acquire a proprietary interest in the Yard Company. To effectuate this design, Armour and Swift threatened to receive their shipments at points other than at the Yard Company's yard. To make this threat real they constructed their own receiving yard called the Central Stock Yards, located on the tracks of the Yard Company, adjacent to the public yards. The packers then brought suit in the State courts of Illinois against the Yard Company to require it to permit the trunk lines to make delivery at the packers' new receiving yard over the tracks of the Yard Company, and thus deprive the Yard Company of its yardage charge. In that proceeding the packers established the fact that the trunk lines stood ready to make delivery to the new receiving yard, and had attempted to do so but had been physically stopped by the Yard Company. The steps thus taken by Armour and Swift proved effective: the Yard Company capitulated, a deal was made, the packers dismissed their case in the courts, deeded over their own newly constructed receiving yard to the Yard Company, made certain guaranties with respect to the income to be received by the Yard Company from its yardage charges, and finally agreed never to receive their livestock in Chicago at a point other than the Union Stock Yards. In return they secured a proprietary interest in the Yard Company and a voice in its management, and, as the Commission found, the Yard's facilities became their own facilities for the receipt of livestock in Chicago. (R. 41-46)

The following is quoted from the Report of the Federal Trade Commission on the Meat Packing Industry (Ex. 59):

"SECTION 6.—The Formation of the New Jersey Company.

"In 1890 a holding company, known as the Chicago Junction Railways & Union Stock Yards Co., was organized under the laws of New Jersey for the purpose of acquiring the stock ownership of the Union Stock Yard & Transit Co. of Chicago, Ill. The history of the formation of the New Jersey company, based upon data obtained from the records of that company, can be summarized as follows:" (p. 198)

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"SECTION 7.—Demands of Armour, Swift, and Morris for a Share in the Earnings of the Company.

"In the course of his examination by the Commission's representative, F. H. Prince also made statements tending to show that the New Jersey company owes its existence partly to the inability of Nathaniel Thayer as president of the Yards company to satisfy the demands of the three big packers, Armour, Swift, and Morris, *for a share in the earnings of the company and a voice in its management.* In view of the fact that in the first meetings of the board of directors of the New Jersey company plans were considered whereby the packers would become managerial and profit-sharing factors in the stockyards of Chicago, credence may be given to the assertion that the three big packers had made concerted demands of this nature before the holding company was formed. Furthermore, a review of the wide range of schemes thus considered shows that none of them would have been possible of consummation by the Yards company operating under the restricted charter granted by the State of Illinois in 1865." (p. 199)

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"From the information contained in the course of this study it appears: * * *

"That Prince and Armour were enabled successfully to gain advantages at the expense of the stockholders of

the New Jersey company because of favorable conditions created by demands for a share in the earnings of the stockyards of Chicago which were made upon the New Jersey company *after 1906* by the three big packers, Armour, Swift, and Morris. *Demands of a similar character had been advanced and only temporarily satisfied in* 1891." (p. 192)

If, as indicated, the New Jersey Company was created to deal with the packers it lost no time in doing so, because the latter accomplished their purpose to obtain an interest in the business of the Yard Company, and to share in the earnings accruing from the yardage services, by an agreement in writing dated January 15, 1892. The parties to this agreement are Chicago Junction Railways and Union Stock Yards Company (the so-called New Jersey Company, owner of the Union Stock Yard & Transit Company) as party of the first part, and, the Swifts on behalf of Swift & Company, the Armours as co-partners composing the firm of Armour and Company, and others of the big packer group, as parties of the second part. (Ex. 47) A little later, on June 23, 1892, a similar contract was made between the New Jersey Company and the so-called small packer group. (Ex. 48)

Prior to the execution of these contracts the packers had taken three major steps with the object either of avoiding the payment of yardage charges on direct shipments, or of obtaining an interest in the business which was imposing them.

The first of these steps was to acquire several thousand acres of land at a point in Indiana about 10 miles from Chicago which, the packers declared, could be used as a new site for their plants.

The other two moves of the packers have a more vital relationship to the issue in this proceeding. One of these is described in the contract of 1892 as follows:

"[The packers] have purchased and acquired certain premises at Packingtown aforesaid, known as the 'Central Stock Yards' near the yards of the said Transit Company,

and have constructed and erected on said premises various platforms, pens, sheds, railway sidings, etc., *for the purpose of receiving and distributing among themselves any and all cattle and live stock owned or purchased by them outside of the City of Chicago or directly consigned to them or either of them, and thereby avoiding the payment of any yardage charges to the said Transit Company*, and have demanded that the said Transit Company permit the use of their railway tracks for the transportation and delivery of such cattle and live stock to their said Central Stock Yards." (Ex. 47, pp. 4 and 5)

To force the Yard Company whose rails served the newly constructed Central Stock Yards the packers then took action in court which is described in the contract of 1892 as follows:

"Armour & Company, Swift and Company and Nelson Morris & Company have recently commenced three several suits in equity in the Circuit Court of Cook County, State of Illinois, against the said Transit Company, claiming and demanding as relief that the said Court by order and decree compel the said Transit Company to afford facilities over its railways for the transportation and delivery of any and all cattle and live stock belonging or consigned to them or any of them, or to said Central Stock Yards without the payment of the usual yardage charges thereon as heretofore paid by them and collected by said Transit Company." (Ex. 47, p. 5)

It will be observed that the sole purpose of the Central Stock Yards acquired by the packers was avowedly to provide a place where they could take delivery of their direct shipments, not in accordance with the long established custom and usage at the yards, by the employment of the Yard Company as their agent for that purpose, but on their own premises, and without the payment to the Yard Company of its yardage charges. Having acquired this yard contiguous to their killing plants, and located between the main tracks of the Yard Company, the packers brought suits in the State courts of Illinois naming the Union Stock Yard & Transit Company as the only defendant. The

purpose of the suits was to require the Yard Company to permit the line-haul carriers to use the tracks of the Yard Company in making deliveries to the packers' yards, the so-called Central Stock Yards. The several bills of complaint (Exs. 49, 50, 51) allege that the Yard Company is a common carrier; that the packers have constructed their stockyards upon its tracks, and have connected their yards by viaducts with their killing plants, and that the Central Stock Yards thus constructed and located was more conveniently and economically located for the packers than the Union Stock Yards. The complaint in the suit brought by Swift alleges:

> "'The Central Stock Yards, located at the corner of Justine and 43rd Streets,' and the same are designed for the sole and exclusive use of the owners thereof, to wit: your orator, Armour & Co. and Nelson Morris & Co. *for the receipt of their own cattle bought by them at points outside of Chicago and transported to said premises for the purpose of being slaughtered at their said slaughtering and packing establishments.*" (Ex. 49, pp. 20a, 21a.)

The bill alleges that the trunk line railroads had attempted to make delivery of their livestock at the Central Stock Yards over the tracks of the defendant yards, but had been prevented by the Yard Company from doing so. The bill alleges further that:

> "the said Union Stock Yard and Transit Company, * * * also claims the right to make and compel the payment of so-called yardage charges for all live stock so owned by or consigned to your orator for delivery upon its said premises, of 25 cents per head for cattle, 6 cents per head for sheep, 8 cents per head for hogs and 15 cents per head for calves, which said charge is made as a charge *in favor of said Union Stock Yard and Transit Company and in addition to the freights charged for the transportation of said live stock.*" (Ex. 49, pp. 25a, 26a.)

The allegations of Swift's bill were sworn to by G. F. Swift. In support thereof Swift and the other packers presented to the

court affidavits of the officers of the trunk line railroads showing that the latter were ready and willing to make delivery to Swift at its plant facility, the so-called Central Stock Yards, and that they had attempted to make such deliveries and were prevented from doing so by the Yard Company. (Exs. 53, 54, 55) By other affidavits the complainants established the adequacy of their plant facility, the Central Stock Yards, to handle the direct shipments which it was intended to receive. (Exs. 65, 66)

Swift and the other packers were formally advised by the sworn answer of the Yard Company in the suits instituted by the packers, that the Company claimed the right

> "to require the payment of a yardage charge for all livestock received and unloaded at its said stock yards" and
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> "by Section 2 of its charter * * * was expressly authorized to make and require to be paid such reasonable charges as might be deemed just and proper for the care, subsistence and handling of livestock received and unloaded at its said yards * * * and that in the exercise of its power conferred by said charter it claims the right to charge for all live stock delivered in its said yards reasonable yardage charges." (Ex. 52, p. 32)

The action taken by the packers in erecting their own stockyard facilities and in bringing the suits against the Yard Company related specifically to the payment to the Yard Company of yardage charges on direct shipments. Their purpose was to avoid further payments of that charge unless they could acquire an interest in the Yard Company, and participate as a proprietor in the imposition of the charge and the proceeds thereof. It is highly significant that they made no demand upon either the Yard Company or the line-haul carriers that they be permitted to consign their directs to the public yards and then remove them without paying a yardage charge. Instead, they recognized that the only way to avoid the yardage charge was to take delivery of the directs at some point other than the public yards. From the outset the packers recognized that the trunk

lines had no interest in the yardage charges, and at no time suggested that they had already paid for the yardage service as a part of transportation, or that the railroads could or should participate in any adjustment of the charge or any change in the established practice.

The situation created by the demand of the packers for an interest in the assessment of the yardage charges by the Yard Company, and the steps taken by them to force its acceptance, was temporarily composed by the agreements of 1892. A tentative arrangement contemplated that the packers would become part owners of the New Jersey Company by taking a large block of stock, and being represented on its board by P. D. Armour.[1] (Ex. 59, p. 202) It developed, however, that the concessions so proposed to be granted to the packers were more liberal than the New Jersey Company could carry out and, as will be shown, in the contract executed, income bonds were substituted for the stock issue.

The contract as drawn (Ex. 47) after reciting that: "the principal revenue and income of said Transit Company are derived from yardage charges on cattle and live stock and from the sale of feed" (p. 3), outlines the three steps taken by the packers to avoid the payment of yardage charges on their direct shipments, *i.e.*, (1) the purchase of the site ten miles from Chicago, (2) the construction of the Central Stock Yards adjacent to their plants and (3) the suits against the yards to compel delivery at those yards. By the covenants which follow the packers agree:

First. To convey their Central Stock Yards to the New Jersey Company. (p. 8)

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[1] It appears that Swift's General Counsel was a director of the Union Stock Yards Company in 1894. When he took office as such, how long he continued in that capacity, and how many other representatives of the packers were on the Board, if any, does not appear. (Ex. 59, p. 314; Ex. 70, p. 9.)

Second. That having consented to compromise their claims and demands against the said Transit Company as set forth and alleged in said three suits (p. 7):

> "* * * they will cause each and all of the said suits to be discontinued and abandoned at their own proper cost and expense, and that they will not, nor will any of them, at any time during the continuance of this agreement, make or set up against the said Transit Company the claims and demands alleged in the bills of complaint in said suits, nor directly or indirectly bring or cause to be brought any similar suits at law or in equity making or alleging any claims or demands similar to those set forth in said bills of complaint." (p. 9)

Third. To convey to the New Jersey Company 1,000 acres of their proposed new site in Indiana, located approximately 10 miles from Chicago.

Fourth. For 15 years from the first day of July, 1891, to continue their businesses at Packingtown, and to "guarantee that any and all cattle and livestock slaughtered by them or any of them, or said companies or either of them on their said premises or within 200 miles of the City of Chicago, during such period, shall pass through and use said yards, *and pay the usual yardage and charges therefor.*" (pp. 10, 11)

Fifth. To "guarantee that the said Transit Company shall receive and collect from its yardage and charges on cattle and live stock, owned or purchased by or consigned to said parties of the second part and said companies, at said yards, the aggregate sum of at least $2,000,000 within six years," and to make up any deficiency in that amount. (p. 11)

Eighth. The contracts of the New Jersey Company with both the large and small packers, contain covenants by the packers that *as long as the Yard Company shall conduct its business at Chicago* they will never be interested in any other facility for the receipt and use of their direct shipments. The provision is as follows:

"EIGHTH:—The said parties of the second part further covenant and agree that as long as the said Transit Company shall conduct the business of a general stock yard for cattle and live stock at the City of Chicago, State of Illinois, on its premises aforesaid, or any part thereof, they and said Swift and Company and said Fairbank Canning Company will not, nor will any of them, within the limits of the City of Chicago, establish or carry on, directly or indirectly, or be concerned or interested in any manner or form whatsoever in any stock yards in said city for the receipt and use of their own live stock." (pp. 13, 14)

In consideration of these covenants the large packers as a group received an interest in the Yard Company evidenced by income bonds of the Jersey Company in the amount of $3,000,000. Swift received approximately one-third of these bonds. The small packers similarly received income bonds and cash for like covenants made by them.

It will be seen, therefore, that when the packers entered upon their negotiations with the Yard Company in 1892 they were considering two alternative courses with the New Jersey Company.

The first was to insist upon their right to receive their directs upon their own premises, unloading the stock themselves and avoiding the payment of any yardage charges.

The second alternative under consideration by the packers was to continue the existing practice and so to give up their privilege of receiving their direct shipments at some point other than the public stockyards free from the imposition of any yardage charges, provided they were given an interest in the business of the Yard Company, a voice in its management and a share of its earnings.

The packers made their choice between these alternatives in the contract of 1892. They demanded, and had been tentatively promised a large stock interest in the company, but the demand proved more exacting than the yard interests

could meet. As finally drawn, the contracts gave the packers a large block of the *income bonds* of the New Jersey Company, the return from which was dependent upon the earnings of the Yard Company from its yardage services. Although the contracts are silent as to the voice which the packers were to have in the management of the yards we know that the complainant had at least one representative on the board of the Yard Company.

In consideration of the interest thus acquired in the business of the Yard Company the packers agreed to continue to consign their direct shipments to the yards and to guarantee enough business to bring earnings to a prescribed level, conveyed to the yards their Central Stockyards, and their proposed site 10 miles from Chicago and agreed that never so long as the Yard Company continued in business in Chicago would they use any other yard in Chicago for the receipt of their direct shipments.

The evidence fully supports the following finding of the Commission:

> "The evidence shows that for more than 70 years, under the usage and practice at the Union Stock Yards, the responsibility of the railroads in respect of direct shipments of livestock consigned to said yards has ended with the unloading service, and that by affirmative action, beginning about 1890 and continuing for many years, the packers, including complainant and intervener, insisted that the performance of the yardage service upon their shipments was a private matter between themselves and the Yard Company, unaffected by the tariffs covering the transportation charges of the railroads. The position of the packers was that their patronage of the services and facilities of the Yard Company was a thing of value to the Yard Company and that they proposed to sell that patronage to the Yard Company. They succeeded in obtaining an interest in the business of the Yard Company by threats to terminate the practice of taking delivery of their direct shipments through the agency of the Yard Company

and to receive the stock at their own yards. As owners of income bonds of the Yard Company, and with a voice in its management (the general counsel of complainant was a director of the Yard Company in 1894), the packers continued to pay the yardage charges, guaranteed the earnings therefrom for a limited period, and guaranteed for an unlimited period never to receive livestock in Chicago other than at the Union Stock Yards." (R. 45)

E. THE RELATIONS BETWEEN THE YARD COMPANY AND THE PACKERS SUBSEQUENT TO 1906.

The commitment of the packers to continue their operations in Chicago expired in 1906. But their covenant not to use any other yard facilities for the receipt and unloading of their livestock in Chicago runs forever, or so long as the Yard Company continues its business in Chicago. Since the packers did not agree not to move after 1906, they did not unqualifiedly agree to use the Yard Company's facilities after that date. They did agree, however, never to use any other facilities in Chicago for the receipt and use of their shipments so long as the Yard Company maintained its yard there. Consequently, so long as the packers remain in Chicago they are bound. The only concern of the Jersey Company after 1906, therefore, was to keep the packers in Chicago.

The Federal Trade Commission Report (Ex. 59) discusses in much detail the negotiations and the relationship between the Yard Company and the packers, down to the year 1918. Exactly how much those interested in the Union Stock Yards paid the packers subsequent to 1906, and how many of the packers participated in the distribution, the Commission was unable positively to determine. It did find that Armour and Company or J. O. Armour received a large additional interest in the yard's business just about the time the Supreme Court was holding such a transaction to be illegal in the *Pfaelzer* case (226 U.S. 286). The Commission also found that there was evidence from

which it could be inferred that about the same time the other big packers were also given an additional interest in the yard's business. In weighing this evidence, however, it must be remembered that those representing the yard's interests undoubtedly realized that the danger of the packers leaving Chicago became more attenuated each additional year that the move was deferred and may have believed that an arrangement which would hold one of the large packers in Chicago would constitute an adequate safeguard against a move by any of them. The Federal Trade Commission's report shows conclusively that such an arrangement was made with Armour.

The stockholders of the New Jersey Company were informed that it was necessary for the yards to continue to make payments to the packers and that this could best be done by permitting the packers to organize another company which would participate in the earnings of the yards. Upon this understanding the minority stockholders of the New Jersey Company consented to the organization of the Maine Company in 1911. The organization of the Maine Company, the control exercised by that company, the value of the assets which it acquired, and Armour's interest therein, reported in great detail by the Federal Trade Commission, (Ex. 59) are sufficiently indicated by the following excerpts:

> "The secrecy with which Prince and Armour surrounded all their transactions in connection with the Maine company, beginning with the purchase of the New Jersey company's common stock in 1910, and up to the time of the formation of the company in 1911, when dummies were employed in the organization of the company, was emphasized by the issue in 1914 of bearer warrants in lieu of the regular stock certificates which up to that time served as evidence of the ownership of the company." (Ex. 59, p. 264.)
>
> "It is pertinent to inquire into the reasons for the issuance of the bearer warrants in lieu of stock certificates as an evidence of ownership in the Maine company. F. H.

Prince stated to agents of the Commission that in issuing the bearer warrants he was prompted solely by the desire to conceal Mr. Armour's interest in the Chicago stockyards, as *it had always been advertised throughout the West that the management of the yards was absolutely free from control by the packers.* He found that should Armour's interest in the yard become known it would injure the reputation of the Chicago stockyards as an independent market among the livestock raisers.

"Another and perhaps more urgent reason for issuing the bearer warrants may be found in the following clause of the Plan of June 30, 1911, which the stockholders of the New Jersey company were induced to accept:

"No assenting stockholder shall have any interest in any of the shares of the New Company (Maine company) or of the disposition thereof.

"From the facts as developed above, it does not appear that the committee's pledge was taken seriously by the promoters. It has been shown that F. H. Prince and J. O. Armour, who between them held over 33,000 shares of the common stock of the New Jersey company, became the sole owners of the stock of the Maine company. Prince and Armour could not well permit the fact to become known that Prince and Armour were the beneficiaries of the Plan and that the confidence of the assenting stockholders had been betrayed. Had this fact become known the reputation not only of Prince and Armour but of the men who had acted as the committee and of those who had assisted in soliciting the assents would have been weakened in the eyes of the investing public. The bearer warrants were evidently designed in part to forestall such a situation." (Ex. 59, pp. 267, 268)

"The fact that the Maine company owns less than one-fourth of the voting securities issued by the New Jersey company does not, however, prevent the Maine company from actually controlling that company due to the fact that Prince succeeded in being elected president and in securing the election of a sufficient number of his associates as directors in 1911 to insure to him the majority

control of the management of that company." (Ex. 59, p. 251)

"It is desired to point out merely that the stockholders of the company who were asked to give their assents to the Plan of Prince and Armour were not told of the real value of the property and its actual and potential earning power, but other methods were employed which did not disclose the value of their properties.

"In order to summarize the important points brought out in the preceding pages, relating to the financial condition of the New Jersey company, and of its subsidiary companies, in 1911, it should be noted that the combined surplus of the New Jersey company, the Yards company and the Railway company, each of which has been stated individually, aggregated $5,668,899.82. It was also pointed out that certain investments of the New Jersey company were carried on the books of the company at less than their real value, and that both the Yards company and the Railway company had, for several years, pursued a policy of charging additions to, and improvements of their properties to operating expenses which might well have been charged to capital accounts." (Ex. 59, p. 215)

Swift's Efforts to Participate in the Earnings Accruing From Yardage Services Subsequent to 1906.

After a searching investigation, including an examination of Swift's books, the Federal Trade Commission was unable to determine whether Swift succeeded in participating in the yard's earnings subsequent to 1906 as the following excerpts show:

"The report * * * gives evidence showing that Swift and Morris expected to benefit as a result of the formation of the Maine company. It is this evidence, coupled with the fact that the records of the Maine company disclosed lack of regularity in the handling of certain treasury bonds of the company, which gives rise to the surmise that the demands of these packers may have been partly satisfied by the receipt of these bonds." (Ex. 59, pp. 193-4)

"In the absence of any tangible evidence which would show what the ultimate outcome of the subject matter under discussion in the above letters was, further comment can only be based upon speculation. One interpretation which might be offered would be that Swift, or possibly both Swift and Morris, had been given a part, or the whole, of $1,600,000 of Maine company bonds. It has been shown that while Prince has been receiving the interest on $485,000 of the $2,085,000 of bonds received by the Maine company from the New Jersey company and its subsidiary companies no records could be found showing to whom the interest on $1,600,000 of these bonds has been paid.

"F. H. Prince has been examined several times by representatives of the Commission with reference to the disposition of the bonds and the interest paid on them since 1914, but no satisfactory information could be obtained from him on these two points." (Ex. 59, p. 261)

The important thing here is not whether Swift was successful in its efforts to continue its participation in the earnings which accrued from the yardage charges, the collection of which is now alleged to constitute an unreasonable practice. The important thing, for reasons which we discuss later, is that Swift attempted to participate in those earnings through a long period of years. The negotiations undertaken and the efforts made by Swift to accomplish this purpose are developed at length in the report of the Federal Trade Commission. (Ex. 59, pp. 206 *et seq.*, esp. pp. 260 to 263.) In his appearance before a Congressional Committee in 1919 L. F. Swift, while insisting that his later efforts were unsuccessful, testified:

"I know that we wanted this arrangement to continue * * * He (Prince) told me if I would keep still and not press the matter—not move our plant or not threaten to move it, keep still, I might get something after awhile." (Ex. 70, p. 3)

The witness was referring to the arrangement under which his company had acquired an interest in the Yard Company, and

participated with it in the assessment and collection of yardage charges.

Swift had not decided that the assessment of a yardage charge on its direct shipments (which it had then paid for almost 50 years), was an unreasonable practice as late as December, 1913 because it was still seeking then to participate in the earnings from that service. At that time as Swift testified, "I thought Swift and Co. was going to get some consideration; yes, sir." (Ex. 70, p. 16.) In answer to the question whether he "thought the consideration you were going to get would be the equivalent of what you had been getting under the old arrangement?" Swift stated, "I was in hope so." (Ex. 70, p. 16.)

The hearings before the Congressional Committee disclosed that even in 1919 Swift was not sure whether he might reasonably continue to hope that his company would be accorded further participation in the earnings accruing to the yards from its yardage services, or must recognize that opportunity to be gone. (Ex. 70, pp. 22–24.)

F. THE EVIDENCE SUPPORTS THE COMMISSION'S FINDING THAT THE PACKERS, IN EFFECT, MADE THE UNION STOCK YARDS THEIR OWN TERMINAL FACILITY IN CHICAGO FOR THE RECEIPT AND USE OF THE DIRECT SHIPMENTS OF LIVESTOCK DELIVERED TO THEM THERE.

Even in the absence of the relations between the packers and the Yard Company which we have been discussing, the evidence would show that by the usage and custom of 75 years transportation in respect to this traffic has ended at the unloading pens. Termination at that point is an inseparable part of the very usage and practice which was found by the Commission in *Adams* v. *Mills*, 286 U. S. 397, to have irrevocably marked the unloading as part of the transportation service. This Court sustained the Commission in so finding. It was there found that all of the parties to the transaction had so long treated the loading and unloading service as being included in

transportation that its character as such had become fixed. We are concerned here with exactly the same usage and custom except that it has grown older with the years. The boundary of the transportation service which the Court found had been fixed by that usage and custom is of necessity the boundary here and the evidence shows that the service thus established as transportation includes the unloading and excludes services and facilities after unloading within the yards. The Court has upheld the Commission in finding that long usage and practice at the Chicago yards to be controlling and the evidence here defines the nature and extent of that long established practice with complete exactness.

But the record here goes far beyond mere acquiescence of shippers in a continuing practice of the railroads and the Yard Company to treat the unloading as the boundary line between transportation and stockyards services. In the relations of the packers with the Yard Company we have facts showing an express, affirmative acceptance of the practice by the shippers, circumstances not present in *Adams* v. *Mills*. More than that, the facts show that the packers actually became the partner of the Yard Company in imposing the yardage charge on all stock unloaded, that they guaranteed and participated in the earnings from that service, obtained a voice in the management of the business, and finally, abandoned their own unloading facilities and agreed so long as they remained in Chicago to take their stock at the Union Stock Yards, thus, in effect, and in return for an interest in the business, making that yard their own facility.

The trunk line railroads were complete strangers to the action taken by the packers to obtain an interest in the earnings accruing to the Yard Company from yardage service on direct shipments. In the transactions and negotiations which began at least as early as 1890, and continued for many years, the railroads had no part. The packers recognized that the railroads were in no way concerned with the handling of the stock following the unloading, that the yardage service was not part of

transportation, and had not been paid for in the transportation rate, but was a service to be bought and bargained for through negotiations with the Yard Company. This is the interpretation which the packers themselves placed upon the usage and custom, both in making the contract of 1892 and in negotiating for a continuance of the "arrangement" over a period of many years. So much for the proof which these transactions offer that complainant has long understood the effect of the established custom and usage and fully accepted its validity.

We submit that the evidence supports the Commission's findings, as follows:

> "From the beginning, all shippers were required to pay to the Yard Company a yardage charge on every animal unloaded at the yards. The amounts of these charges were determined solely by the Yard Company, the services and facilities were furnished solely by the Yard Company, and the dealings with respect to the yardage charges were solely between the Yard Company and the shippers." (R. 42)
>
> * * * * *
>
> "The railroad companies were not parties to the agreement, and there is nothing in the record to indicate that the packers deemed the collection of the yardage charges to be an unreasonable practice on the part of the railroad companies. On the contrary, the action of the packers shows that at the time the agreement was entered into they did not consider the assessment of the yardage charges a matter in which the railroads were in any way concerned." (R. 44)

But, as stated, the proof goes much further. It shows that complainant became a partner of the Yard Company in the imposition of yardage charges on every animal unloaded in the yards. It shows that complainant shared the responsibility of that practice and in return for a share of the earnings from that service, guaranteed that those earnings would be maintained at a certain level, conveyed title to its own unloading facilities,

and agreed, so long as the Yard Company continued in business in Chicago, never to use any other yard for the receipt of its stock.

The Commission summarizes its long detailed findings on the history of the custom and practice respecting the delivery of livestock at this yard "and the action of the parties in relation thereto"[1] as follows:

> "For many years the packers, including complainant, made the practice of which they now complain their own practice. They gave up their own terminal facilities at the Central Stock Yards for a substantial consideration, and, by their covenants with the Yard Company, made the Union Stock Yards their own terminal facilities in Chicago." (R. 46)

Swift charges (its brief, p. 65) that the Commission erred in giving any weight to the facts upon which these findings were based, because in doing so "the Commission attempts to apply the doctrine of estoppel * * *." In view of the nature of this evidence it is natural that Swift would think of the doctrine of estoppel, but the Commission does not apply or even refer to that doctrine. In order to pass upon the reasonableness of the assailed practice the Commission investigated its history "and the action of the parties in relation thereto."[1] The controlling importance of the evidence is that it shows not only that transportation at this yard has always ended with the unloading, but shows also that all of the parties have participated in and recognized the reasonableness of that practice.

The report of the Federal Trade Commission which was in evidence before the Interstate Commerce Commission, and from which the latter learned the full history of the yardage charge and the contractual relations between the packers and the Yard Company in respect thereto, led the Congress to enact the Packers and Stockyards Act, 1921, by which the Yard Company was compelled to file its yardage charges with the Secre-

[1] *Adams* v. *Mills, supra.*

tary of Agriculture. In *Stafford* v. *Wallace*, 258 U. S. 495, (1922), this Court passed upon and sustained the constitutionality of the Packers and Stockyards Act. In his statement of the case, Chief Justice Taft quoted the finding of the Federal Trade Commission in the same report, that the packers' participation in the stockyards business at the primary markets had given them control over the yardage charges as follows:

> "'The packers' power is increased by the fact that they control all the facilities through which live stock is sold to themselves. Control of stockyards comprehends control of live stock exchange buildings where commission men have their offices; control of assignment of pens to commission men; control of banks and cattle loan companies; control of terminal and switching facilities; *control of yardage services and charges;* control of weighing facilities; control of the disposition of dead animals and other profitable yard monopolies; and in most cases control of all packing house and other business sites. Packer owned stockyards give these interests access to records containing confidential shipping information which is used to the disadvantage of shippers who have attempted to forward their live stock to a second market.' Summary of Report of the Federal Trade Commission on Meat Packing Industry, July 3, 1918." (pp. 500–501)

II

THE COMPLAINT PRESENTED ADMINISTRATIVE QUESTIONS WHICH REQUIRED THE EXERCISE OF THE INFORMED DISCRETION OF THE COMMISSION.

A. THIS COURT HAS REPEATEDLY HELD THAT THE ISSUES BEFORE THE COMMISSION IN THIS CASE ARE NOT PURE QUESTIONS OF LAW BUT ARE ADMINISTRATIVE QUESTIONS.

In view of the character and the weight of the evidence which the Commission had before it here, for the first time, it may readily be seen why Swift does not question the Commission's

decision as lacking support in the record. Instead, Swift seeks to disregard the evidence by arguing that the issues of this case are "non-factual," that there are no administrative questions here and, as a matter of law, that Swift is entitled to require the line-haul carriers to extend their services beyond the point at which those services have always terminated throughout the entire history of the Chicago Union Stock Yards.

The fundamental issue before the Commission was stated in its report as follows:

> "The determination of the question at issue in this proceeding requires the determination of the point at which the transportation of direct shipments of livestock to the Union Stock Yards ends. If the transportation ends when the stock is placed in unloading pens, the obligation of the defendants ceases at that point. If, however, the transportation does not end until after complainant has removed the stock beyond the boundary of the stockyards, then there is an obligation on the part of defendants to provide means by which removal of the stock may be accomplished free from the payment of a yardage charge." (R.46–47)

After full consideration of the evidence discussed above, the Commission made the following specific finding:

> "We find that the transportation of direct shipments of livestock consigned to complainant at the Union Stockyards in Chicago, Ill., ends when the livestock has been unloaded into the unloading pens at the Union Stock Yards. We further find that the yardage charges assessed by the Union Stock Yards and Transit Company of Chicago on direct shipments of livestock, as defined in this respect, transported to the Union Stock Yards, for services performed and facilities used beyond the gates leading from the pens in the stockyards into which the livestock is unloaded from railroad cars, are not subject to our jurisdiction.
>
> "We further find that defendants' failure to afford egress for shipments of livestock described in the preced-

> ing paragraph free from the payment of yardage charges has not resulted and does not result in an unreasonable practice." (R. 55)

Swift attacks the Commission's decision by asserting that, as a matter of law, the Commission was bound to find that transportation did not end at the unloading pens. It claims a legal right, under its construction of the word "transportation" in the Interstate Commerce Act, to demand that the transportation duties of the line-haul carriers, which heretofore have always terminated at the unloading pens, should extend through the stockyards to the adjacent public street. (Brief, pp. 12 to 30)

As Swift phrases it, "The principal contention is that the Commission and the District Court made fundamental errors in their construction of the law." (Swift brief, p. 4) Its statement of the question to be decided is introduced with the words "May appellants lawfully demand the right * * *." (p. 2) It argues that "egress is required as a matter of law." (p. 33) The issues of the case, it says, are "non-factual." (pp. 84, 85) Although it filed its complaint with the Interstate Commerce Commission, it now argues that the Commission actually had no administrative discretion. This Court, it urges, should vacate the Commission's order upon a mere reading of the statute on the ground that, by order of the statute, Swift had the right to demand that the transportation of its direct shipments of livestock consigned for delivery at the Chicago Union Stock Yards should no longer terminate at the unloading pens in the yards but should extend to public streets beyond.

Swift is not alone in urging this contention, for Armour, which has intervened in this proceeding, has filed a long brief prefaced with the following words:

> "While intervener entirely supports appellants on such assertions, this brief is written upon the assumption that every finding of fact made is supported by substantial evidence; that the evidence requires no findings which were

not made, and that each finding of the Commission has been found by this Court to be true, correct and adequately supported by evidence. * * *

"This brief will start with that point, and attempt to establish that even so, there remain patent misinterpretations and misapplication of principles of law to such facts. And we shall attempt to prove such errors by application of simple rules of grammar and etymology to the Statute in question, and by analysis of the decisions of this Court relating to the subject matter." (pp. 1, 2)

The decisions of this Court are directly contrary to appellants' contentions. It has long been held that whether a certain service is a part of "transportation" is not a pure question of law, but is, instead, dependent upon the facts, and that when the Commission has decided that a certain service is or is not transportation, the finding will be sustained if there is evidence to support it.

Three of the cases so holding were concerned with the scope of transportation of livestock shipments at this same Chicago Union Stock Yards: *Adams* v. *Mills*, 286 U. S. 397 (1932); *Atchison, T. & S. F. Ry. Co.* v. *United States*, 295 U. S. 193 (1935); *Armour & Co.* v. *Alton R. Co., et al*, 312 U. S. 195 (1941). An examination of these cases will show how erroneous is Swift's theory that the limits of transportation are to be determined as a question of statutory construction. The *Armour* case is conclusive upon the point, but we shall discuss the decisions chronologically in order that the Court may have before it the development of the rule which governs the case.

1. *The decision in Adams* v. *Mills.*

Adams v. *Mills*, 286 U. S. 397, arose out of an increase in the unloading charge by The Union Stock Yard and Transit Company without the sanction of the Commission. The Commission held that the unloading of the livestock at that yard was a part of transportation, and, on the basis of that finding,

issued a reparation order. In the suit to enforce that order, it was asserted that, as a matter of law, the unloading was not a part of the transportation service. The Court overruled the argument and sustained the order of the Commission, holding that the determination of the question as to what was included in the transportation service was dependent upon the facts, and was a matter for the informed judgment of the Commission. In the opinion Mr. Justice Brandeis said:

> "Whether the unloading in the yards was a part of transportation was not a pure question of law to be determined by merely reading the tariffs. Compare *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 294. The decision of the question was dependent upon the determination of certain facts, including the history of the Stock Yards and their relation to the line-haul carriers; the history of the unloading charge at these yards; and the action of the parties in relation thereto. If there was evidence to sustain the Commission's findings on these matters, its conclusion that the collection of the extra charge from the shippers was an unreasonable and unlawful practice must be sustained. *Atchison, T. & S. F. Ry. Co.* v. *United States*, 232 U. S. 199, 221; *Los Angeles Switching Case*, 234 U. S. 294, 310, 311." (pp. 409–410)

The Court then reviewed the evidence before the Commission which, it held, sustained the findings of the Commission respecting the scope of the service. It laid particular stress upon the fact that although "throughout the United States, the duty of unloading carload freight rests ordinarily upon the consignee," the history of the practice at the Chicago Union Stock Yards showed that a different practice had been in effect there, accepted by all the parties, ever since the organization of the Yard Company. It pointed out that for several years the Yard Company had filed a tariff with the Commission showing the unloading charge as a transportation charge, and that the usage and physical conditions justified the Commission's decision that "no reason existed for permitting a departure from that practice." (p. 415)

The evidence here shows, as the Commission has found, that from the beginning in 1865, and at all times since, "there has been a line of demarcation between the services which shippers were entitled to receive for the transportation charges and the services received from the operator of the stockyards." (R. 42) The unloading service involved in *Adams* v. *Mills* was on one side of that line, the services involved here were on the other. Consistently with the practice so long in effect, this Court, in 1912, required the Yard Company to file a tariff with the Commission covering the unloading service,[1] and in 1921 when the Packers and Stockyards Act was passed the Yard Company filed its tariff with the Secretary of Agriculture, covering the separate and distinct charges which it had always imposed on all animals received at the yard.

The ruling in *Adams* v. *Mills* is, we believe decisive of this appeal. In both cases the question before the Commission was whether transportation of livestock to the Chicago Union Stock Yards included a particular service. In *Adams* v. *Mills* the service was unloading; here it is the removal of the animals out of the stockyards after they have been placed within the yards by order of the shipper. In both cases the Commission, upon the basis of extensive evidence, made its finding as to the scope and the limits of the transportation service. In both, the established usage and the physical conditions were found to justify the existing practice. The similarity continues, since in both cases the challenge of the Commission's finding in this Court rested on the theory that the definition of "transportation" is a matter of law, i. e., in the words of Swift, a "nonfactual issue," which should be settled by a judicial construction of the words of the statute rather than by an administrative judgment. The rule stated by Mr. Justice Brandeis in *Adams* v. *Mills* is the answer to Swift's claim here. It is significant that Swift makes no mention of *Adams* v. *Mills* in its argument that the

[1] *United States* v. *Union Stock Yard and Transit Co.*, 226 U. S. 286.

administrative judgment of the Commission should be set aside upon a reading of the statute, and elsewhere in its brief refers to that case only incidentally. (p. 42)

2. *The decision in the Hygrade case.*

The rule enunciated in *Adams* v. *Mills* was applied by this Court again in *Atchison, T. & S. F. Ry. Co.* v. *United States*, 295 U. S. 193 (1935), usually referred to as the *Hygrade* case. The Hygrade Company, unlike Swift and Armour, proceeded before the Commission against the Yard Company as well as the line-haul carriers, complaining of the yardage charge of the Yard Company on Hygrade's direct shipments consigned to the Chicago Union Stock Yards. The Court's opinion, reviewing the Commission's decision, heavily stressed again the factual character of the issues. Reference was made to *Adams* v. *Mills* as follows:

> "Long continued practice and special conditions made unloading at these yards a transportation service to be performed by the carrier. *Adams* v. *Mills*, supra, 410 *** *Usage and physical conditions combined* definitely to end transportation, at least in respect of these shipments, with unloading into suitable pens as is now required by Section 15(5)." (pp. 200–201)

The Commission's decision was reversed because it "made no definite finding as to what constitutes complete delivery or where transportation ends." (p. 201) The decision of those questions, it was held, was a matter for the Commission and not for the Court. The Court recently referred to its decision in the *Hygrade* case as follows:

> "There the Commission's order directing the discontinuance of appellant's yardage charge to consignee was set aside on the *sole* ground that the Commission's findings failed to show that the service for which the charge was made was any part of the loading or unloading services, or otherwise a service which the rail carrier was bound to furnish." *Union Stock Yard & T. Co.* v. *United States*, 308 U. S. 213. (1939)

It is apparent from this quotation, as it was from the *Hygrade* opinion, that the Commission's action was not set aside on the ground that, as a pure question of law, the transportation duties of the line-haul carriers terminated at the unloading pens, but because the findings of fact which determine these issues are for the Commission and it had not, in that case, made them sufficiently clear.

Unlike its report in the *Hygrade* case, the Commission's findings here are so full that their adequacy is not questioned. It may be noted, too, that the record before the Commission in the *Hygrade* case has been shown by the record here to have been peculiarly incomplete. As we have pointed out, many of the essential facts have been introduced for the first time in this case. These include a full showing as to the optional Chicago delivery points, other than the public stockyards, to which shippers who desire to pay no yardage charge can and do consign their directs, the adequacy of those delivery points to handle all shipments consigned for delivery there, the practice of Swift itself in the receipt of its direct shipments, and the active participation and profit of the packers in the establishment and maintenance of the delivery practice which has been in effect at these yards since the Civil War. With the full facts before it, the Commission has recognized that the conclusion reached by a majority of the Commissioners on the partial record in the *Hygrade* case was not tenable.

3. *The decision in Armour* v. *Alton R. R. Co.*

The decisions in *Adams* v. *Mills* and the *Hygrade* case provided the background for a decision at the last term of this Court which, we submit, is conclusive against the sole argument which is again urged by the packers here. With the same factual situation and the same issues before it in that case as here, the Court held that the issues arising from the demands of Swift and Armour cannot be disposed of simply as a problem of statutory construction, as Swift and Armour urge, but that the

decision of the issues lies within the field of informed administrative judgment vested in the Commission. *Armour & Co.* v. *Alton R. Co. et al.*, 312 U. S. 195 (1941)

The demands of Armour and Swift against the line-haul carriers were identical and were made jointly. Armour, which is under common control with the Yard Company, sought to avoid the jurisdiction of the Commission by instituting its suit in court; Swift began its suit before the Commission. Armour then intervened in the Swift proceeding, alleging that it had instituted a suit in court "on the same facts and same subject matter." (R. 124) The relief demanded by Armour in its complaint in court was the same as that sought by Swift before the Commission. The issues were the same. The relationship of the cases was noted by this Court, which said:

> "The complexities of the situation here presented are graphically illustrated in the companion case of *Swift & Co.* v. *Alton R. R.*, 238 I. C. C. 179. Swift, one of Armour's competitors, took its petition for alteration of the same long-standing practice directly to the Commission. That expert body found it a necessary prerequisite to decision to have a trial examiner conduct extensive hearings, compiling in the process a record of 5 volumes, 1147 pages, and numerous exhibits." 312 U. S. 195, 202.

Armour contended that the issues raised by the packers' demand upon the line-haul carriers were of a strictly legal character and that the doctrine of primary jurisdiction in the Commission was therefore not applicable. Nothing was necessary to the disposition of its demand, Armour argued, save a construction of the statute and the application of various court decisions. It was contended that the Commission would have no alternative under the law but to grant the packers' demand, that no administrative question was presented, and therefore, that the doctrine of primary resort was inapplicable.

These arguments, one and all, were rejected in the *Armour* decision. In accordance with the established rule, the Court

held that the issues present administrative problems, that there is no rule of law that the transportation service in respect to livestock consigned to the public yard in Chicago continues through the yard to the public streets beyond, and that it is for the Commission to determine, on the basis of the evidence, where transportation terminates. The Court's opinion on this fundamental issue reads in part as follows:

> "Basically, on the merits the issue here presented is whether Armour and Company, one of the packers, is correct in its contention that under the facts of this case the railroads must deliver its shipments of livestock at such a location and in such a manner that it need pay no 'yardage charge' to the Stock Yards Company. * * The ground on which the Circuit Court affirmed was that *the issues involved presented administrative problems*, necessitating primary resort to the Interstate Commerce Commission. The sole question we find it necessary to decide is whether the Circuit Court was correct in this conclusion.
>
> * * * * *
>
> "This statement of the facts alleged in the complaint reveals that there are many questions relating to complex transportation problems that must be solved as a prerequisite to a determination of whether the railroads, in violation of contracts or governing laws, have failed properly to deliver petitioner's livestock. For illustration:
>
> "FIRST. At what point did the common carriers' duty to transport come to an end? *Neither the statute nor any applicable principle of governing law can be said to mark this boundary, under all circumstances and conditions and in all cases.*"—312 U. S. 195, 196, 200.

Here is the repudiation by this Court of the theory advanced by Armour and now urged again both by Swift and by Armour. In the clearest terms, the Court established that the Commission had the statutory authority, which Swift denies, to determine the point at which transportation of these direct shipments terminates. Of necessity, the Commission's authority

is not limited to determining the case in favor of the packers. "If there was evidence to sustain the Commission's findings on these matters, its conclusion * * * must be sustained." *Adams* v. *Mills*, 286 U. S. 397, 410.

Swift asserts over and over throughout its brief that we contended below, and will contend here, that the holding in the *Armour* case has put the Commission's conclusion here beyond the scope of judicial review. That, of course, has never been our position. But we do contend that the *Armour* case is decisive against the particular attack and the only attack which Swift is actually making upon the Commission's conclusion. Swift does not seek judicial review of the adequacy of the evidence to support the Commission's findings. Rather, its contentions are identical with those relied upon by Armour and overruled by the Court in the *Armour* case. Armour said that it did not need to present its case to the Commission because the packers had an absolute legal right to demand that the services in question be furnished as a part of the transportation service. Swift says that although it presented its case to the Commission, that expert body had no alternative except to issue an order in favor of the packers because, it is said, the packers have an absolute legal right to demand the extension of the transportation services beyond the unloading pens. The Court's denial of this argument in the *Armour* case is equally applicable here.

The determination of the point at which transportation of these shipments at the Chicago Union Stock Yards terminates is only one of several administrative issues pointed out by this Court in the *Armour* case. The fact that this case necessarily involves the Commission's rate making function was expressly recognized, the Court stating that a judgment in favor of Armour "would in effect constitute a readjustment of their rate schedules." (312 U. S. at 201) Moreover, the Court said:

> "FOURTH. If, as petitioner insists, it is the duty of the railroads to provide terminal facilities which they do not

now own, possess or control, a drastic change might have to be accomplished by them. Property might have to be acquired, expensive facilities might have to be secured, and correspondingly, rates might have to be adjusted. The need for such steps raises a transportation problem of the greatest magnitude, involving many intricate considerations such as must always play a part in evaluating a claim that new depots and facilities are necessary." 312 U. S. at 201.

The practical application of this vital consideration is evidenced by the Commission's report in this case. (R. 52-53) Swift has suggested only two "possible means of egress" to the public streets. (Swift brief, pp. 81–82) The first of these is egress to what is known as Packers Avenue, which is not a public street at all but is part of the private property of Swift. (R. 361) In return for the Yard Company's charge, Swift's livestock unloaded at the yard has always been taken across the yard to Swift's own property. What Swift asks is that the transportation service on livestock consigned to the yard, end not at the yard, but continue beyond that point until the animals are deposited on Swift's own property. The other alternative, which is the only suggested possible exit to a public street, would require the use not only of the Yard Company's ways and facilities between the unloading pens and the boundary of the yards, and the handling of the animals to that point, but also the use of a bridge over Halsted Street (a major thoroughfare) and facilities on the other side of the street from the stockyards to bring the animals down from the bridge to an alley.[1] (R. 357–358) These facilities are at present used by all the

[1] It is somewhat remarkable that Swift seeks to distinguish this case from the *Hygrade* case by the fact that the *Hygrade* shipments used a tunnel under the street for egress while the Swift shipments, on Swift's suggested means of egress, would, instead, use a bridge over the street, both the tunnel and the bridge being property of the Stock Yards Company. (Swift's brief, pp. 81–82) The Commission found that "the alleged difference is not one of substance." (R. 48)

packers whose plants are located east of the stockyards, not only to remove their direct shipments, but also to remove the animals they have purchased in the yards. (R. 359–360) The Commission did not find that it would be practicable for these properties to be taken over by the railroads or that the suggested facilities could handle the great volume of Swift's direct shipments without causing undue congestion with the animals of the other packers or blocking the public ways at the point of egress of the animals. On the contrary, it made this finding:

> "The evidence fails to disclose how, as a practical matter, an annual volume of 30,000 carloads of livestock could be discharged into and handled through the public streets of Chicago." (R. 53)

Swift seeks to distinguish the holding in the *Armour* decision that administrative questions exist in respect to the adequacy of the existing facilities as follows:

> "The terminal facilities are those which the carriers now use under lease. It is not suggested that additional terminal facilities should be provided by the carriers or that they should acquire additional property." (Swift's brief, p. 87)

Both statements are erroneous. There is no lease by the trunk lines of any of the facilities at the stockyards. The charge of the Yard Company for the service of unloading the animals into the unloading pens is paid for out of the line-haul rate, but even if that charge were argumentatively to be called a "lease" (which it is not) it would cover only the facilities necessary to the unloading service, not the facilities of the Yard Company beyond the unloading pens, within the yards.[1] The foregoing factors as to the physical situation emphasize the importance of the administrative question noted by the Court in the above quotation.

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[1] During the long period when the Yard Company was contesting its status as a common carrier by reason of its loading and unloading services, it incorporated in its tariff filed with the Commission the statement that in the performance of

Finally, the Court in the *Armour* case decided that the precise definition of a station area is not a matter of law but is a question for the Commission. The Court said:

> "SIXTH. The complaint alleges that petitioner is willing to accept delivery at any point in the station area. What the station area embraces is not defined. Whether there is property in the area on which the railroads could erect pens is not shown. To decide this issue would require a court to define the boundaries of a station named in a tariff approved by the Interstate Commerce Commission." 312 U. S. at 202.

Swift seeks to avoid this holding by the following argument:

> "No such question is involved in the pending case. The station area is not in dispute. It consists only of the pens and chutes rented by the railroad defendants from the stock yard company for unloading and delivery of shipments of live stock transported to Chicago."[1] (p. 89)

Swift here concedes that the facilities of the Stock Yards Company beyond the unloading pens are not part of the station area. Since that is so, the railroads should not be required to provide those additional facilities. Quite aside from this concession, however, the Commission's finding that the practice is reasonable is supported by the evidence and therefore is, we believe, conclusive.

The treatment of the *Armour* decision in the briefs of Swift and Armour on the present appeal serves to emphasize the fact that the Court there held that the issues raised by the packers' demands cannot be determined as non-factual matters

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those services it was acting as the "agent" of the line-haul carriers. Swift's effort to attach significance to that self-serving phrase of the Yard Company is misplaced, since it referred only to the loading and unloading and not to the services and facilities involved in the removal of the animals from the yard.

[1] Swift's error of fact in stating that the pens and chutes are "rented," has been referred to above.

of law. Armour has filed a forty-seven page brief here in which it cites the same cases and makes the same arguments that were contained in its brief before the Court last year. The most striking feature of its present brief is that there is not the slightest effort to distinguish that decision; in fact, there is not a single citation or mention of the *Armour* decision! What Armour is doing, as intervener here, is to seek a reversal of the *Armour* case, without a single reference to the decision which it is seeking to thwart.

Swift's brief contains a detailed attempt to distinguish the *Armour* case, but the nature of the attempted distinctions show that Swift is simply rearguing the issue decided in that case. After quoting the holding that the issues are administrative, Swift says that the application of that holding to this appeal is merely to establish that this proceeding was begun before the proper tribunal. (Brief, p. 84) Swift is unwilling to recognize the obvious, that since the issues are administrative, it is in error in urging that these issues are non-factual and involve simple statutory or legal construction. Cf. *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 291, 292 (1922).

Swift next argues that "The court did not, in the Armour decision, place the present case beyond the confines of judicial review." (Brief, p. 84) This argument is an oblique effort to avoid the holding quoted above (p. 55) that resort to the Commission was necessary here because the point where the transportation comes to an end is not marked by the statute or governing law "under all circumstances and conditions and in all cases." The fact is, of course, that no one has ever argued that this case is "beyond the confines of judicial review." What is very earnestly argued, by the Government, the Commission, and the railroad interveners alike, is that the single point on which Swift seeks judicial review is precisely the point that the Court has just decided adversely to its conten-

tion in the *Armour* case, namely, that the issue here is of an administrative character and is not an issue of law.

Swift's most extraordinary use of the *Armour* case is its repeated argument that the following portion of the *Armour* decision "definitely settles the point that the Commission has, and therefore should exercise, the jurisdiction which it disclaimed in the present case" (Swift brief, p. 86):

> "*If* use of the terminal facilities for egress to the street after unloading of livestock is a part of transportation, as petitioner alleges, and *if* this use is a service for which reasonable compensation is justified, it cannot be doubted that this charge, like the unloading charge, is a part of that reasonable transportation rate determination of which is committed to the jurisdiction of the Interstate Commerce Commission." 312 U. S. at 200–201.

Swift quotes this statement at four places in its brief (pp. 25, 32, 41, 86) and reiterates the argument without quotation elsewhere. (p. 18) It seeks to use these words as if they constituted a holding by the Court that the use of the facilities within the yard is a part of transportation, that it is a service for which reasonable compensation is justified, and that therefore the Commission has jurisdiction to fix the rate to be assessed for the service and should do so. Swift would thus entirely disregard the fact that the Court's statement is a conditional one. We think it would have been impossible for the Court to have stated more plainly its holding that there were conditions precedent to the Commission's jurisdiction over the yardage charge, and that those conditions involved the determination of administrative problems for the Commission, and were not pure matters of law for the courts. It was only by a determination of the very question which this Court held that the Commission must decide that the Commission reached the conclusion that it lacked jurisdiction over the yardage services. The issues were left by the Court to the Commission and the

Commission has resolved them against the contentions of the packers.

4. The foregoing decisions are illustrative of the settled rule.

The three cases which have been discussed, namely *Adams* v. *Mills*, the *Hygrade* case and the *Armour* case, all dealing with the situation at the Chicago Union Stock Yards, establish that the issues of this case are administrative and that since the Commission's decision is supported by the evidence, it should be sustained. These cases do not stand alone. They represent specific applications of the general rule that the questions of where transportation duties end or begin, and of the kind of facilities which should be furnished by the carriers, are not pure questions of law but are matters for the informed judgment of the Commission. For example, in *Mitchell Coal and Coke Co.* v. *Pennsylvania R. R.*, 230 U. S. 247 (1913), the question was where transportation began with respect to certain shipments of coal. The plaintiff argued that, as a matter of law, transportation began at the station and not at the mines. The Court denied this contention and held that the question was one for the Interstate Commerce Commission, saying:

> "But neither the statute nor the tariff defines what are station limits, nor do they fix the exact point from which the transportation must begin, nor the territory within which the delivery must be made. These limits necessarily vary with the size of the communities, the extent of the yards, the practice of the carrier, and the bounds within which it uniformly receives and delivers freight.
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> * * * * *
>
> "In case any question arose as to the reasonableness of the practice, the limits within which the station rates should apply, or the reasonableness of the allowance paid those shippers who supplied motive power, the Commission alone could act." (pp. 263, 264.)

Similarly, in *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402 (1937) it was held that the determination of

the extent of transportation is a matter for the Commission and not for the courts. The Commission had decided that the spotting of cars on industrial plant tracks, in the circumstances there present, was not part of the transportation service and had ordered the railroads to cease rendering the service under their line-haul rates. The decision of a District Court setting aside the Commission's order was reversed by this Court, which said:

> "The Commission is clearly empowered to determine what is embraced within the service of transportation and what lies outside that service."[1] (p. 408.)

This decision was relied upon and followed in *United States* v. *Pan American Petroleum Corp.*, 304 U. S. 156 (1938). The *Los Angeles Switching Case*, 234 U. S. 294 (1914), is to the same effect.

In a similar case, the court in *Louisville Cement Co.* v. *U. S.*, 19 Fed. Supp. 910 (D. C. W. D. Ky., 1937), refused to set aside the order of the Commission, saying:

> "It is frequently difficult to determine when delivery is completed or transportation begun. It is a question of fact, and the Interstate Commerce Commission is peculiarly fitted to determine at what point the carrier has begun or completed straight transportation. * * *
>
> "The Commission had the authority to determine in the instant case where transportation under the line haul charge ended." (p. 916.)

In *Loomis* v. *Lehigh Valley R. Co.*, 240 U. S. 43 (1916) the question was whether the carrier had failed to perform its "duty to furnish adequate cars." The plaintiff's claim there was identical in principle with that of Swift here, that the carriers

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[1] The Court also said: "The Commission found that line-haul rates had not been fixed to compensate the carriers for the services in question." (p. 404.) The Commission has made an identical finding in the *Swift* case as follows: "They [the defendants] have never been compensated for any services performed at the stockyards after the placement of the animals in the unloading pens." (R. 45)

have failed to perform their duty to furnish adequate facilities for delivery. This Court held:

> "An adequate consideration of the present controversy would require acquaintance with many intricate facts of transportation and a consequent appreciation of the practical effect of any attempt to define services covered by a carrier's published tariffs, or character of equipment which it must provide, or allowances which it may make to shippers for instrumentalities supplied and services rendered. In the last analysis the instant cause presents a problem which directly concerns rate-making and is peculiarly administrative." (R. 50.)

In view of these decisions, there was nothing novel in the holding of the Court in the *Armour* case that the questions raised by the packers' demands, such as the question whether transportation ended at the unloading pens or at the boundaries of the Yard, could not be resolved by a judicial construction of a statute or case law but required the exercise of expert administrative judgment. Since there is no contention here that the evidence before the Commission failed to support its judgment, the issues, we believe, have been settled by the Commission's decision. The decision depended upon the usage and practice, upon the peculiar physical conditions at the Union Stock Yards, and upon the availability of other points for delivery of Swift's direct shipments to Chicago. Such factors as these make the question one which, in the language of Mr. Justice Brandeis, "is essentially one of fact and discretion in technical matters." *Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U. S. 285, 292 (1922).

5. The Commission's decision is supported by the decisions of this Court and the Commission in the Covington cases.

In the *Armour* case, Armour argued that *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128 (1891), supported its claim

that the issues raised by the packers' demands were not administrative. The Court rejected this contention. It stated that the controlling issue was not determined "by any applicable principle of governing law" (312 U. S. 195, 200) and then commented specifically upon the *Covington* case, noting that it was begun before Congress adopted the Interstate Commerce Act and that it "is not determinative of the respective jurisdictions of the courts and the Commission in this case." (312 U. S. at 200) Both Swift and Armour now reargue the same point, again contending that the *Covington* decision is authority that as a matter of law, and without regard to the factual situation, the line haul carriers are obligated to provide the facilities necessary to remove the livestock from the yard to which it has been consigned. The short answer to this argument is the Court's comment in the *Armour* case quoted above.

The facts and holding of the *Covington* case are, however, of interest here since it was apparently that case which led to the construction by the packers of their own Central Stock Yards at Chicago and their demands upon the Chicago Stock Yards Company culminating in the agreements of 1892. By their actions the packers demonstrated in a practical way that they fully understood the actual holding in the *Covington* decision which is very different from the construction which they place upon it here. We think it doubtful if any decision of this Court has ever been the subject of more misstatement and more misuse than that in the *Covington* case both in this proceeding and in the *Armour* case. In the interest of accuracy, we desire to direct attention to the actual holding in the case.

The evidence in the *Covington* case showed that deliveries were currently being made at unloading platforms provided by Keith along the railroad's track, just as Swift is now receiving its stock at its own yard. Later, the receiver of the railroad caused these platforms to be torn up. The railroad by contract with the Covington Stock Yards Company had expressly made

the yards of that company its "depot for delivery of all its livestock" during a fifteen-year term, and had agreed that it would not "allow to be built on its right-of-way any other depot or yards for the reception of livestock." Keith was thus compelled to take delivery there and to pay a "lottage" (or yardage) charge on such receipts in order to get them out of the Covington Stock Yards. Under these circumstances, the Circuit Court issued an *alternative* decree quoted in full in the Supreme Court opinion. The decree was to the effect that if the stockyards filed its consent, the railroad should deliver Keith's livestock at the Covington stockyards free of any charge for passing through the yards; in that event the railroad would not have to deliver at Keith's platform or any other point. This, however, was *not* an absolute order. In case the stockyards failed or refused to file such a consent, the decree laid no obligation upon the railroad to make such delivery through the property of the stockyards free of charge. It merely ordered into effect the second of the alternatives (and this was the only part of the decision appealed from) that if Keith, *the shipper*, restored the unloading platform and chute on his land adjacent to the tracks of the carrier, the latter would be obligated to deliver to that platform all livestock consigned for shipment thereto.

The Supreme Court affirmed this decree. As clearly appears from the quotation below, the affirmance was based solely upon the ground that the carrier could not rightly refuse to deliver the livestock to the consignees' own stockyards and thus force him to accept his livestock at another yard and submit thereto the payment of an additional charge for yardage.

> "But as the appellant did not accord to appellees the privileges they were entitled to from its principal, the carrier, and as the carrier did not offer to establish a stock yard of its own for shippers and consignees, the court below did not err *in requiring the railroad company and the receiver to receive and deliver live stock from and to the appellees*

at their own stock yards in the imm diate vicinity of appellant's yards, when the former were put in proper condition to be used for that purpose, under such reasonable regulations as the railroad company might establish. It was not within the power of the railroad company, by such an agreement as that of November 19, 1881, or by agreement in any form, to burden the appellees with charges for services it was bound to render without any other compensation than the customary charges for transportation." 139 U. S. at 136.

A decree for Swift here such as that entered in the *Covington* case would have been equivalent to a dismissal of this complaint. An alternative order requiring the railroads either to deliver the stock at the Chicago Union Stock Yards without the assessment of a yardage charge, provided the Union Stock Yards should consent to withdrawing that charge, or, in default of such consent that the railroads be required to deliver without extra charge to Swift's own yard would leave the situation exactly as it is. Just as the trunk lines were willing to make deliveries at the packers' new Central Stock Yards in 1891, and actually attempted to do so, they have been, and are now, ready and willing to make such deliveries at Swift's own facilities (or at the other delivery points), and appellant is actually receiving all its livestock there.

It may be noted that at Covington the railroads had been making free delivery at Keith's unloading platforms for some time before refusing to make further deliveries there. At the Chicago Union Stock Yards yardage charges on directs have always been levied and have always been paid by the packers. Furthermore, at Chicago, in place of a contract such as that existing at Covington between the railroads and the Covington Stock Yards, making the latter the railroad's "depot for delivery of all its live stock," and restricting the making of deliveries at other points, there is a contract to the same effect but it is between Swift (and the other packers) and the Union Stock Yards.

In this connection we direct attention also to one of the first cases decided by the Commission. *Keith* v. *Kentucky Central R. R. Co.*, 1 I. C. C. 601 (1887). This case involved the same facts as those in the Supreme Court decision in the *Covington* case. Keith complained that the railroads were exacting unjust charges, in that all cattle consigned to Keith were compelled to pass through the Covington Stock Yards, although Keith had convenient stockyards of his own. The Commission found that the exaction of a charge for passing through the yards of the Covington Stock Yards Company prevented the complainants and their customers from shipping or receiving livestock on equally favorable terms with the customers of the Covington Company, and issued its order as follows:

> "Until the defendants provide some other suitable and convenient place at Covington, where the complainants may ship and receive live stock free from other than the customary transportation charges, *the defendants should be and will be required to receive from and deliver such live stock to complainants at their own yards.*" (p. 603)

Thus, the Commission did not take jurisdiction of the yardage charges at the Covington Stock Yards and did not order that deliveries at those yards should be made without the exaction of yardage charges. Here again, as in the Supreme Court's decision in the *Covington* case, there is an express recognition both of the absence of any obligation on the part of the railroads to cause the Stock Yards Company to remove its yardage charges assessed against the consignee where the railroad is willing to deliver elsewhere, and of the importance of alternative points of delivery in relation to the obligation of the railroads.

The decrees of the court and of the Commission in that litigation illustrate the complexities of the question and its dependence upon the factual situation rather than the application of an automatic rule of law. That the packers fully understood the holding is demonstrated by their action in the early nineties.

Instead of demanding that the carriers provide free egress from the Union Stock Yards, they built their own stockyards, like Keith at Covington, and then demanded that deliveries of their directs be made to those stockyards.

In an effort to offer some explanation for the packers' affirmative acceptance of the Yard Company's right to assess a yardage charge on every head of the direct shipments of livestock received through its yards, Swift says now that on July 1, 1891, the effective date of the packers' contract with the Yard Company for the delivery of the direct shipments at the Union Stock Yards, it was not clear that there was any remedy for the packers' "grievance other than to move their plants from the Union Stock Yards or to enter into the compromise contract." (Swift Brief, p. 65.) It will be noted that the date so specified was subsequent both to the Commission's decision in the *Covington* case (1887) and to this Court's decision in the same case, (March 2, 1891) and was prior to the execution in 1892 of the packers' contract with the Yard Company. Thus, according to Swift, the packers recognized at that time that a claim to receive their direct shipments through the property of the Yard Company free of the yardage charge would find no support in the *Covington* case. The fact was, of course, that the packers never had any such "grievance" and, instead, affirmatively agreed at all times that the practice with regard to the yardage charge on direct shipments received through the stockyards was entirely reasonable. Only in the last few years have the packers sought to place a different meaning upon the *Covington* case.

B. SWIFT'S PRESENT INTERPRETATION OF SECTION 1 (3) OF THE ACT IS CONTRARY TO THE INTERPRETATION OF THAT SECTION BY SWIFT AND ALL PARTIES SINCE ITS ENACTMENT.

The present position of Swift and Armour as to the interpretation of the Interstate Commerce Act is contrary to the long standing interpretation of that Act by all the parties

interested in the Chicago livestock situation, including the packers. Armour characterizes its argument as an "application of simple rules of grammar and etymology." (Brief, p. 2.) It consists of a quotation from Section 1 (3) of the Act,[1] followed by a contention that by law one of the "services in connection with the * * * delivery" of the shipments of directs consigned to the Chicago Union Stock Yards is necessarily the provision of facilities and services for taking the animals out of the stockyards to the public streets.

To appraise this argument, it is necessary to recall that ever since 1865 the Yard Company has assessed and collected for itself a so-called yardage charge on every animal "received" at its yards regardless of the extent of the use of the facilities of the Yard Company for the particular shipment. The collection of that charge was constantly a matter of great moment to the packers. Three generations of skilled counsel for the packers have reviewed it. If the charge had ever been thought to be unlawful, as a matter of "grammar and etymology" or otherwise, it must be assumed that it would have been protested and would have been attacked by a suit in the courts, a proceeding before the Commission, or, within the last twenty years, before the Secretary of Agriculture. No such protest was ever made. Yet, on the theory argued by Swift and Armour, that charge was illegal at common law and has been illegal under the Interstate Commerce Act for many years.

The packers' interpretation of the common law, Section 1 (3) of the Interstate Commerce Act and the other sections of that

[1] Sec. 1(3): "* * * The term 'transportation' as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and *all services in connection with the* receipt, *delivery*, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported." (49 U. S. C. § 1 (3))

Act as laying no obligation upon the railroad to provide transportation beyond the unloading pens at the Union Stock Yards is emphasized by the position taken by them in the repeated examinations by the Commission into the transportation services performed at those stockyards. Soon after the passage of Section 1 (3) in 1906, the Commission instituted an action against the Yard Company to compel it, among other things, to file tariffs covering its transportation charges. The action resulted in a decision by this Court, holding that the Yard Company is a common carrier subject to the Act, and ordering it to file its transportation charges. *United States* v. *Union Stock Yard & Transit Co.*, 226 U. S. 286 (1912). The tariff which was filed in accordance with that ruling contained the loading and unloading charges but did not contain the yardage charges. If the packers had interpreted Section 1 (3) the way they now urge the Court to construe it, they would, of course, have objected that the Yard Company had failed to comply with the Court's order. Instead, they raised no claim that the yardage charges on direct shipments were illegal or should be treated as transportation charges.

Moreover, Swift was a party to the extensive investigation of the Yard Company's activities resulting from that company's cancellation of its I. C. C. tariff in 1917, but made no suggestion that the charges on direct shipments were transportation charges or that the established practice was unlawful or unreasonable. *Livestock Loading and Unloading Charges*, 52 I. C. C. 209 (1919); 58 I. C. C. 164 (1920); award sustained in *Adams* v. *Mills* 286 U. S. 397 (1932).

In its exceptions brief before the Commission in this proceeding, Swift advanced three reasons to reconcile its long continued acceptance of the practice and its active participation in the assessment of the yardage charges with its present argument that the charges are illegal. All three of them were wrong in fact, and they have been abandoned here. They are, neverthe-

less, important as indicating the actual position of Swift during those years as contrasted with its attempted explanation.

The reasons were advanced under the following heading: "It was not clear that complainant had any remedy, other than mutual agreement of the parties, for a number of years." The first was as follows:

> "After the expiration of that contract,[1] and in view of the fact that it could not be renewed because of the passage of the *Elkins Act*, consideration should be given to the situation in so far as any relief by way of a legal proceeding was involved. * * * The definition of 'transportation,' now contained in section 1 (3) of the Interstate Commerce Act, did not, until the passage of the Transportation Act in 1920, read as follows:
>
> > 'irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.' (See Interstate Commerce Acts Annotated, vol. 1, p. 229.)
>
> "It was therefore not at all clear prior to that time that the Interstate Commerce Act placed upon the carriers any duties which could be specifically enforced as to local deliveries." (Swift's brief, March 30, 1939, pp. 152, 153.)

In advancing this excuse for the packers' failure to claim that Section 1 (3) gave them any right to obtain egress for their direct shipments free of the yardage charge, counsel evidently overlooked the fact that this portion of the Act was added, not by the Transportation Act of 1920, but by the Act of June 29, 1906, and has not been changed since 1906. (34 Stat. 584.) It was as much available to Swift in every year since 1906 as it is today, yet Swift and its counsel, as did all the other interested

[1] Swift refers to the expiration in 1906 of certain terms of its 1892 contract with the Stock Yards Company; as already noted, one of its vital provisions is still in effect.

parties, interpreted it as leaving unaffected the practice of assessing yardage charges on all direct shipments.

The second reason advanced by Swift to the Commission to explain its change of view toward the Act was as follows:

> "Section 1 (6) of the Interstate Commerce Act, as it now exists, did not come into being until the amendment of February 28, 1920; and there was therefore no statutory duty placed upon the carrier to establish reasonable practices in connection with receiving and delivering of property." (Swift's brief, March 30, 1939, p. 153.)

On the contrary, Section 1 (6) was enacted in the Mann-Elkins Act of June 18, 1910. (36 Stat. 544.) The amendment of February 28, 1920 had no effect on this statutory duty of the carriers; it merely omitted two separate words ("and" and "such") and one phrase ("with reference to commerce between the States and with foreign countries"). (See Interstate Commerce Acts Annotated, Vol. 1, p. 633.) These were the sole changes in 1920. Both in 1910 and after the amendments of 1920, the section read as follows:

> "It is hereby made the duty of all common carriers * * * to establish, observe, and enforce * * * just and reasonable regulations and practices affecting * * * rates * * * the facilities for transportation * * * and all other matters relating to or connected with the receiving * * * and delivery of property * * * which may be necessary or proper to secure the safe and prompt receipt * * * and delivery of property * * * upon just and reasonable terms * * * ."

The third reason stated by Swift was as follows:

> *"It was not until the 1920 amendment of Section 15 (1) of the Act that the Commission was given specific power to make an order concerning a regulation or practice."* (Swift's brief, March 30, 1939, p. 154; italics are Swift's.)

On the contrary, specific power to make an order concerning regulations or practices affecting rates was conferred by the

Hepburn Amendment of 1906. (See Interstate Commerce Acts Ann., Vol. 3, p. 1866.) The practice with regard to delivery at the Union Stock Yards affects rates; the present controversy is with respect to that practice in so far as it does affect rates. It is the yardage charges that are in dispute. But even this limitation on the power of the Commission to make an order concerning regulations or practices was removed by the Mann-Elkins Act in 1910. (Interstate Commerce Acts Ann., Vol. 3, p. 1866.)

Thus all three reasons given by Swift to the Commission to explain the belated character of its argument on the legality of the yardage charges under the Act were factually incorrect, and as shown above at page 69, the similar reason stated to this Court merely confirms the fact that the *Covington* case is not pertinent. Since each of the statutory powers of the Commission and duties of the carriers to which Swift has directed particular attention was enacted long before 1920, and since the *Covington* case, now relied on, was decided in 1891, prior to the time when Swift first became a partner in the assessment of these yardage charges, Swift's assertion that it delayed making protest against the imposition of the charges because of the absence of those portions of the statutes must be dismissed as an afterthought. The weakness of the explanation is further shown by the fact that even after the amendment of the Act in 1920, no protest was made or suit brought. Not until thirteen years later did Swift, for the first time in the long history of its operations at the Chicago Union Stock Yards, make any protest against the practice. The real reason why there was no protest in all the years before was that both before and after 1920 Swift as well as the other packers definitely and affirmatively accepted the established practice respecting yardage charges as valid and reasonable.

C. AS THIS COURT HAS JUST HELD, SECTION 1 (3) DOES NOT REQUIRE THAT SERVICES BE PROVIDED BY THE CARRIERS CONTRARY TO THE CONTRACT AND TO THE ESTABLISHED PRACTICE.

As this Court held in the *Armour* case[1] the words in Section 1 (3), "services in connection with * * * delivery," which Swift and Armour now say rendered the yardage charge on directs illegal, are meaningless without a determination of the administrative question as to when and where delivery takes place in accordance with the contract and the usage and practice. If delivery into the suitable pens is in full satisfaction of the contract, and if the Commission, on a record which supports the finding, decides that the long established usage and practice are not unreasonable, then we submit that there is nothing in Section 1 (3) to require that transportation shall include services beyond the unloading pens. Both those circumstances are present here.

The direct shipments move under the Uniform Live Stock Contract. By that contract of shipment, the parties agree that the carrier shall transport the shipments "*to its usual place of delivery at said destination.*" (Ex. 19.) The usual place of delivery of livestock consigned to the Union Stock Yards and indeed, the only delivery point that has ever existed at those yards, is the unloading pens. As was well known to Swift, the carriers have never contracted or held themselves out to provide any services beyond those pens and have never been paid for any such services. The practice approved by the Commission is the delivery practice for which the parties have contracted. This, we understand, is conceded by Swift. In other words, the contract has always provided that the "services in connection with the * * * delivery" of these shipments, as those words are used in Section 1 (3), shall terminate at the unloading pens.

The cases discussed at pages 49 to 64 above, establish the rule that the transportation services under Section 1 (3)

[1] "Neither *the statute* nor any applicable principle of governing law can be said to mark this boundary" of the common carrier's duty to transport. 312 U. S. 195, 200.

required of a carrier are such as are customary and reasonable. For example, in *Adams* v. *Mills*, *supra* p. 49, it was held that whether unloading was a service in connection with delivery which was required of the carriers was not a pure question of law to be determined by the Interstate Commerce Act or by the tariffs, but depended upon certain facts including the history of the yards, their relationship to the line-haul carriers, the history of the charge and the action of the parties in respect thereto. Here the Commission has reviewed these factors and many others and has concluded, on a record which supports the findings, that the usage and practice which has been affirmatively accepted as reasonable by Swift and the other packers ever since the Civil War, is not unreasonable. The very essence of the decision in the *Armour* case is that nothing in Section 1 (3) compelled the Commission to reach a contrary decision.

D. THE LEGISLATIVE HISTORY OF SECTION 15(5) OF THE INTERSTATE COMMERCE ACT AND OF SECTION 406 OF THE PACKERS AND STOCKYARDS ACT DEMONSTRATES THAT CONGRESS HAS RECOGNIZED THE USAGE AND PRACTICE BY WHICH TRANSPORTATION TERMINATES AT THE UNLOADING PENS.

In order to resolve by legislation the question whether the unloading was a part of the transportation service (*i.e.* the question then being litigated in *Adams* v. *Mills*, *supra*), Congress added the following provision to the Interstate Commerce Act in the Transportation Act of 1920:

> "Sec. 15(5). Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee or owner, or to try an intermediate market, or to comply with quarantine

regulations. The Commission may prescribe or approve just and reasonable rules governing each of such excepted services. Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers now existing by virtue of law respecting the transportation of other than ordinary livestock, or the duty of performing service as to shipments other than those to or from public stockyards." (49 U.S.C. Sec. 15(5))

In the words of the Commission, this provision "differentiates between livestock and other carload freight with respect to the unloading service." (R. 49.) As to freight in general, and as to livestock at points other than public stockyards, the carrier normally has no duty to unload, whereas this section makes unloading the carrier's duty with respect to livestock delivered at public stockyards. Swift has attempted to distort this finding by representing that the Commission found that "as to livestock, Section 15(5) repealed Section 1(3) of the Interstate Commerce Act." (Brief, p. 12.) Of course, no such finding was made.

It was argued in the *Hygrade* case (295 U.S. 193, 195), and in some of the cases preceding that decision, that Section 15(5) extended the legal requirements of transportation of direct shipments to the boundaries of the stockyards. This Court rejected that argument in the *Hygrade* case as follows:

"Paragraph (5) of § 15 was passed February 28, 1920, during and presumably with knowledge of the controversy later brought here in *Adams* v. *Mills*, *supra*. While declaring that transportation of livestock to public stockyards shall include unloading without extra charge, it left undisturbed the Yards Company's practice of making a charge for livestock *received*. The Packers and Stockyards Act, approved August 15, 1921, subjects public stockyards to regulation by the Secretary of Agriculture. Section 301(b) defines stockyards services to include, among other things, facilities furnished at a stockyard in connection with the *receiving*, holding and delivery of livestock." *Atchison, T. & S. F. Ry.* v. *United States*, 295 U.S. 193, 199-200 (1935).

In the light of the legislative history of Section 15(5), and of the Court's decision in the *Hygrade* case, Swift has conceded in this case that the section may not be interpreted as extending the transportation duties of the carriers to the streets.[1]

The day that Section 15(5) became effective, just as in all the period before and since that time, the Yard Company continued to assess yardage charges on all livestock received at its yards, including direct shipments. In 1921, for example, there were more than 1,100,000 head of direct shipments to packers (Ex. 38) and the yardage charge was paid on every animal. With this new legislation fresh in the minds of all interested parties, there was no protest from the packers or anyone else that the assessment of the yardage charge on direct shipments constituted a violation of that section. That fact is enough of itself to demonstrate that the packers did not construe the section as requiring a change in the yardage charge practice. Recognizing that its complaint finds no support in Section 15 (5), Swift has been forced to construe Section 1 (3) as having made the collection of the yardage charge on direct shipments illegal since 1906, and to attempt the untenable explanation considered above as to why Swift did not advance its present interpretation of Section 1 (3) until the last few years.

The legislative history of Section 15(5) confirms the understanding of all the parties that the obligations of the carriers end at the unloading pens. The origin of that section was described by the Commission in part as follows:

> "The sole purpose of the amendment to section 15 was to deal permanently and by legislation with the then-pending controversy, later considered by the Supreme Court in *Adams* v. *Mills*, 286 U.S. 397. For almost 50 years prior

[1] Swift's Brief before the I. C. C., March 30, 1939, p. 68, states: "The complaint does not allege any violation of Section 15(5). No evidence tending to show a violation of Section 15(5) was offered by complainant at the hearing."

to the decision of the Supreme Court in 1912, holding the Yard Company to be a common carrier,[1] it had maintained two charges—a charge for unloading the livestock, and a yardage charge imposed on all animals in addition to the unloading charge. The unloading charge had always been absorbed by the line-haul carriers, and the yardage charge had always been paid to the Yard Company by the shippers. Effective May 30, 1913, the Yard Company filed a tariff with us in which it published its charge for the unloading service. Neither that tariff nor any other tariff ever filed by the Yard Company with us included its yardage charges. In 1917 the Yard Company increased its unloading charge from 25 to 50 cents per car; the line-haul carriers refused to absorb the increase, and the additional amount was collected by the Yard Company from the shippers. The livestock producers protested the collection of the unabsorbed 25 cents per car and filed a complaint with us to recover it. *The producers did not complain against the yardage charge they were then paying, nor have they ever complained against the assessment of that charge.* It is significant that at that time the producers were concerned actively with the question of where transportation should be held to end, both by opposing the assessment of an additional charge for unloading and by advocating the amendment to Section 15, subsequently enacted.

"The amendment originated with and was sponsored by the National Live Stock Shippers League and the American Live Stock Association, which were producers' organizations. Senator Cummins, in proposing the amendment, said:

'I am entirely in sympathy with the purpose of these shippers, and want to bring the whole subject within the jurisdiction of the Interstate Commerce Commission, and compel the carriers to state in the published tariffs the rates that must be paid by the shippers for the entire service of taking property at the point of origin and *delivering it to the point at which it is to leave the car.*'[2] (Emphasis supplied.)

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[1] *United States* v. *Union Stock Yard & Transit Co., supra.*
[2] 59 Cong. Rec. 674.

"Later, in 1921, when introducing the Packers and Stockyards Act in the House of Representatives, Congressman Haugen stated:

'It is proposed to give the Secretary of Agriculture * * * jurisdiction from the time the livestock is unloaded at the terminal yards and after it is out of the jurisdiction of the Interstate Commerce Commission. *Up to the time of unloading the livestock the Interstate Commerce Commission has jurisdiction* * * *. Hence, it is proposed that the Secretary's jurisdiction shall begin where the Interstate Commerce Commission's jurisdiction ends * * *.'[1] (Emphasis supplied.)

"Evidence of the intent of Section 15(5) is to be found in the interpretation placed upon it from the date of its enactment both by the packers and the producers. In 1921 pursuant to all requirements of the Packers and Stockyards Act, the Yard Company filed a tariff with the Secretary of Agriculture, in which it published the yardage charges which it had previously assessed on all animals unloaded in the yards. *No complaint has ever been made by the producers who sponsored the amendment regarding the payment of the yardage charge.*" (R. 50–52.)

The producers never attempted by legislation, or otherwise, to alter the established practice regarding the assessment of yardage charges, either on their own shipments, on which they pay the yardage charge or on direct shipments on which the yardage is paid by the packers. Swift admitted this before the Commission and stated with regard to the yardage charge on direct shipments: "They [the producers] were not paying that charge * * *, they never have paid it, and they are not now paying it." (Swift's Brief, March 30, 1939, p. 65.) Although the producers were engaged both in the proceeding which culminated in *Adams* v. *Mills*, and in efforts before Congress which resulted in the enactment of Section 15(5), their interest was solely in the unloading services and charge, and they had no interest in and have never made any complaints as to the yard-

[1] 61 Cong. Rec. 1800.

age charges on direct shipments. Swift was a party to *Adams* v. *Mills*, and it, as a packer, was paying such yardage charges, but it neither argued to the Commission that there was anything illegal about them or suggested to Congress that they were objectionable. The purpose of the amendment was fulfilled when the carriers resumed and continued the former practice of absorbing the loading and unloading charge of the Stock Yards Company. No one intended that the amendment should deal with the yardage charges on direct shipments. In this connection the Commission stated:

> "The language of Section 15(5) specifies the services to be included in the transportation to public stockyards, and it clearly states that it shall include delivery into suitable pens. That does not mean delivery to a public street, delivery to a plant connected by a runway or viaduct with the stockyards, or delivery to a private way which may lead from the stockyards proper. It means delivery into pens on the stockyards' property which are suitable to receive the stock in a safe manner. Had Congress intended to require delivery of the stock beyond the boundary of the public stockyards, it would have so stated. The kind of transportation covered by the provision is transportation to public stockyards, as distinguished from transportation to other than public stockyards. It would be unreasonable to assume, in view of the express language used, that the term transportation was intended to include not only delivery into suitable pens but also the removal from such pens to the public highways.
>
> "*The above interpretation is the interpretation placed upon the amendment since its enactment by the actions of the packers, including complainant and intervener, of the producers, of the Yard Company, and of the railroads.*" (R. 54)

The foregoing interpretation was confirmed by this Court in *Union Stock Yard & Transit Co.* v. *United States*, 308 U.S. 213 (1939). In that case the Court affirmed the Commission's decision that the loading and unloading services provided by the Yard Company for its loading and unloading charges on

file with the Commission, were transportation services and that the Yard Company was therefore subject to the Commission's jurisdiction with regard to those services. The Court referred to Section 406 of the Packers and Stockyards Act, 1921, which provides: "Nothing in this Chapter shall affect the power or the jurisdiction of the Interstate Commerce Commission, nor confer upon the Secretary concurrent power or jurisdiction over any matter within the power or jurisdiction of such Commission," and stated:

> "This Court has since recognized that loading and unloading services such as are here involved are common carrier services placed under the authority of the Commission by the Interstate Commerce Act. *Atchison, T. & S. F. Ry. Co.* v. *United States, supra; Denver Union Stock Yard Co.* v. *United States, supra,* 477. And unless the restriction of §406 of the Packers and Stockyards Act upon the authority of the Secretary of Agriculture in favor of that of the Commission refers to such services, the purpose of the section is not apparent. None other is suggested. See *Atchison, T. & S. F. Ry. Co.* v. *United States, supra,* 199." 308 U.S. at 221.

The Court thus pointedly contrasted the *unloading* services, jurisdiction over which is reserved to the Commission by Section 406 of the Packers and Stockyards Act, with the services and facilities in the Yard *after* the unloading. The page of the opinion in *Atchison T. & S. F. Ry. Co.* v *United States,* to which the Court specifically referred, contains the following statement:

> "Paragraph 5 of §15 was passed February 28, 1920, during and presumably with knowledge of the controversy later brought here in *Adams* v. *Mills, supra.* While declaring that transportation of livestock to public stockyards shall include unloading without extra charge, *it left undisturbed the Yards Company's practice of making a charge for livestock received.*" 295 U.S. at 199.

Moreover, the Court's opinion in *Union Stock Yard & Transit Co.* v. *United States,* regarding the fact that the reservation of

jurisdiction by Section 406 referred only to the loading and unloading facilities and services, continued in a footnote as follows:

> "If this were doubtful, doubt would be removed by the legislative history. S. 3944, 66th Congress, in providing a Federal Livestock Commission to regulate packers and stockyards did not contain such a saving clause. The House Committee on Agriculture proposed a substitute bill giving control of the stockyards to the Interstate Commerce Commission because 'the Commission already has control over transportation of cattle, which does not end until they are *unloaded* at the yards . . .' H. Rept. 1297, 66th Cong., 3rd Sess., p. 9." 308 U.S. at 222.

E. AFTER THE ENACTMENT OF SECTION 15(5) AND UNTIL 1933, IT WAS AT ALL TIMES THE POSITION OF THE PACKERS THAT THE YARD COMPANY'S CHARGE ON ALL DIRECT SHIPMENTS "RECEIVED" COVERED A STOCKYARD SERVICE AND NOT A TRANSPORTATION SERVICE.

The most positive confirmation of the packers' recognition of the legality of the yardage charges on direct shipments is found in the events following the enactment of Section 15(5). Reference has been made to the fact that in 1912 this Court required the Yard Company to file with the Commission a tariff covering all its charges for transportation service, and that after that tariff became effective, the Yard Company, as it had for almost fifty years before, continued to assess the yardage charge on all direct shipments as a distinct and separate charge for a stockyard service and in addition to the transportation charge. At no time did the appellant contend that the Yard Company's charge on all direct shipments "received" at the yard was for a transportation service which was or should have been embraced in the tariff which this Court had required the Yard Company to file with the Commission. In 1921, moreover, when the Packers and Stockyards Act was passed, requiring the filing with the Secretary of Agriculture of all tariffs for "stockyards" services, as distinguished from "transportation" services (7 U.S.

C. Sec. 201) the Yard Company filed a tariff with the Secretary covering its yardage charge on all animals "received," applying alike to direct shipments and all others. The packers continued paying that charge as they always had, and neither at that time nor at any time was that tariff assailed as covering a transportation service. Instead of protesting the application of that tariff charge to its direct shipments the packers paid the charge without complaint. They had not yet evolved the theory that the charges were illegal.

But Swift's and Armour's view of the legality of the charges during those years was not limited to mere acquiescence. Just as they had formerly insisted that they could bargain with the Stock Yards Company (never with the railroads) about those charges, so in 1927 they appeared before the Commission and successfully argued that Section 15(5) had not so changed the Interstate Commerce Act as to render illegal the yardage charges on direct shipments. The packers acquired control of the stockyards at many of the principal markets throughout the country, and they had caused those yards to assess yardage charges on all direct shipments received. In its report herein the Commission states:

> "The packers' interpretation of the amendment is also shown by their affirmative action. The first case to present the question of the effect of Section 15 (5) on the yardage charges on direct shipments arose in connection with charges made by the Fort Worth Stock Yards Company, a public stockyard. *Southwestern Horse & Mule Assn. v. A., T. & S. F. Ry. Co.* 129 I. C. C. 730 (1927). The stockyards company successfully contended that we had no jurisdiction of the yardage charge because, under Section 15(5) the transportation of livestock to public stockyards terminated with the unloading. That company's policies were controlled by Swift & Company and Armour & Company, complainant and intervener herein, which owned 66.8 per cent of the voting stock. It also appears that on July 1, 1928, at several public stockyards in which the packers held a substantial interest, yardage charges

were being assessed on direct shipments.[1] The date of July 1, 1928, was selected because, at that time, the packers were in unlimited possession and control of voting stock of the yard companies referred to." (R. 52)

* * * * *

"The first case, after the enactment of Section 15(5), in which the question was raised was *Southwestern Horse & Mule Assn.* v. *A., T. & S. F. Ry. Co., supra.* There we held that the yardage charges on direct shipments of livestock consigned to a public stockyard for dealers whose places of business were outside the yards were beyond our jurisdiction. The basis for our finding was that transportation to public stockyards ended when the animals were unloaded into suitable pens." (R. 53)

Both Swift and Armour seek to explain away the *Southwestern Horse & Mule* decision, although on mutually contradictory grounds. Swift says the horse dealers there (whose barns were located outside the stockyards) did not seek "a mere egress from the unloading platforms" but "were there requesting a complete stockyards service in addition to transportation." (Brief, p. 22.) It states further: "While some of the dicta in that decision may have been wrong, the decision was right on the facts." (Swift Appendix, p. 85.) Armour, on the other hand, makes no claim that there was a request for complete stockyards services, but says that the dealers were offered free egress by one route but preferred another. (Armour's Brief, p. 20.) It was Armour's counsel here who successfully argued

[1] The stockyards were those at Denver, Fort Worth, Kansas City, Milwaukee, Oklahoma City, St. Joseph, St. Louis, Sioux City, St. Paul, Omaha, Philadelphia and Brighton. In all except two of these yards the packers held more than a majority of the voting stock, and in those two (Omaha and Philadelphia) they held substantial interests (Ex. 73). In *Stafford* v. *Wallace* 258 U. S. 495,500, the Court, quoting from the "summary of report of the Federal Trade Commission on meat packing industry, July 3, 1918" stated: "Control of the stockyards comprehends * * * control of yardage services and charges * * *."

to the Commission on behalf of the Fort Worth Stockyards Company, which was controlled by Armour and Swift, that the yardage charge on the direct shipments was legal. (Armour's Brief, p. 19.)

Each of these two contradictory statements of the *Southwestern Horse & Mule* case is at variance with the facts. The opinion in that case states that approximately 30 per cent of the shipments were removed by the consignees directly from the unloading pens. (129 I. C. C. 730,734.) The description in the Commission's opinion is borne out by the record itself in that case. One of the complainants testified as follows:

> "*A.* We go to the chute and get the mules and drive them through the stockyards and out on the street and to our barn.
>
> *Q.* And for that passage through the stockyards, is that what you pay the 35 cents for?
>
> *A.* Yes, sir." (Record, p. 293, *Southwestern Horse & Mule Dealers Association* v. *A., T. & S. F. Ry. Co.* 129 I.C.C. 730.)[1]

On behalf of the packer-controlled Stockyards Company, Armour successfully argued to the Commission that transportation of the shipments terminated at the unloading pens and that the charges on all direct shipments received at the yard were legal. The explanation for the packers' present shift in the interpretation of the Act is not to be found in the Act, since the Act is, in this respect, unchanged since that time.

Not until 1933, 13 years after the enactment of Section 15 (5), 27 years after the enactment of Section 1 (3) and 42 years

[1]The record also contained the tariff which the packers caused the Fort Worth Stockyards Co. to file immediately before the hearing. The tariff provided for a yardage charge on all horses and mules transferred by the owner from the unloading pens to his barns, without regard to the route of egress. (Ex. 51 of Record in *Southwestern* case.)

after the *Covington* case, did Swift or Armour raise any objection to the established delivery practice at Chicago. They showed their understanding of the meaning of the Act not only by paying yardage charges to the Stock Yards Company on every animal received at the public stockyards but also by their insistence from the early nineties down to 1919 that the matter of yardage charges for the removal of direct shipments was a question for bargaining between the packers and the Stock Yards Company, not a transportation matter for the railroads. They caused the important stockyards companies which they controlled to assess yardage charges on all direct shipments received at those stockyards. On behalf of one of those companies, counsel for Armour successfully argued to the Commission that a yardage charge covering egress of direct shipments from the unloading pens to the street was valid under the Act, and that transportation ended at the unloading pens.

This, we submit, is a remarkable background for the packers' present argument that Section 1 (3), enacted in 1906, compels the Commission to hold that transportation of the packers' direct shipments extends to the streets and that the customary yardage charge, included since 1921 in the tariff for stockyards services filed with the Secretary of Agriculture, is, instead, a transportation charge and is illegal. We submit that the Commission, in accordance with the rule stated in *Adams* v. *Mills*, *supra*, p. 50, properly gave weight to the fact that all parties have for many years been in agreement that the established usage and practice at Chicago was reasonable and lawful.[1]

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[1] In *Union Stock Yard & Transit Co.* v. *United States*, 308 U. S. 213, 223, the Court held that evidence of the situation at other stockyards was irrelevant and sustained the Commission's exclusion of such evidence. In this case Swift claims that the Commission erred in failing to find that at a minority of 13 out of the 58 yards as to which evidence was available at the hearings, (R. 394) no charges were made on direct ship-

F. THE SECRETARY OF AGRICULTURE HAS ASSERTED AND EXERCISED JURISDICTION OVER THESE YARDAGE CHARGES ON DIRECT SHIPMENTS AND IF THE CHARGES ARE UNREASONABLE THE PACKERS HAVE A COMPLETE REMEDY BY COMPLAINT TO THE SECRETARY.

In Section 301 of the Packers and Stockyards Act, 1921, adopted just one year after the addition of Section 15 (5) to the Interstate Commerce Act, there is the following provision:

> "The term 'stockyard services' means services or facilities furnished at a stockyard in connection with the *receiving*, buying or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, of livestock." (7 U. S. C. Sec. 201 (b))

It was this section that the Court referred to in the *Hygrade* case, saying:

> "Paragraph (5) of § 15 was passed February 28, 1920, during and presumably with knowledge of the controversy later brought here in *Adams* v. *Mills, supra.* While declaring that transportation of livestock to public stockyards shall include unloading without extra charge, it left undisturbed the Yards Company's practice of making a charge for livestock *received.* The Packers and Stockyards

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ments in addition to the line-haul rate. (Brief, p. 83) In addition to being irrelevant, Swift's assertion is inaccurate. The tariffs show that at one of the thirteen yards there is no exemption from yardage charges for directs. (Ex. 17) At others the exemption applies only on certain kinds of animals (Ex. 12, Supp. 6), or is conditioned upon the consignee's relieving the carrier of the duty of unloading (Ex. 15), or is given only if the consignee, unlike Swift, has "no direct rail facilities" (Ex. 10). At five of the remaining yards there is collected by the stockyards companies an insurance charge, filed with the Secretary on the theory that transportation terminates and the Secretary's jurisdiction attaches after the unloading. (Exs. 5, 8, 9, 13, 16) At only four of the thirteen yards is Swift's statement correct, and there is no proof of any similarity of these yards with Chicago regarding usage and practice, physical conditions, etc.

Act, approved August 15, 1921, subjects public stockyards to regulation by the Secretary of Agriculture. Section 301 (b) defines stockyards services to include, among other things, facilities furnished at a stockyard in connection with the *receiving*, holding and delivery of livestock. Section 406 provides that the Act shall not affect the jurisdiction of the Commission or confer upon the Secretary concurrent jurisdiction over any matter within the jurisdiction of the Commission." *Atchison, T. & S. F. R. Co.* v. *United States*, 295 U. S. at 199.

In construing the Packers and Stockyards Act, the Secretary has taken the position that these yardage charges on direct shipments at Chicago, and at several other important stockyards, are within his jurisdiction. Following extensive previous investigations into the rates and practices of The Union Stock Yard and Transit Co., the Secretary in 1935, by a formal order, instituted a proceeding for the purpose of determining the lawfulness of all the Yard Company's rates and charges contained in its tariff on file with the Secretary, including the yardage charges on direct shipments which are here being litigated. (Ex. 37) Extended hearings were held, after which, in February, 1938, the Secretary's Examiner filed a proposed report and order. The packers petitioned to intervene in that case after the Examiner's report was issued, and it appears from that petition that the validity of the yardage charges on all direct shipments was upheld in the report. (Ex. 63, pp. 7, 8) After this thorough investigation of the yardage charges, the Secretary terminated the proceeding by accepting a new tariff of the Yard Company, Tariff No. 11, which changed certain charges but which retained the yardage on all direct shipments. (Exs. 64, 67) The Secretary has thus asserted jurisdiction over the very charges that are at issue in this case, and the packers did not oppose the exercise of that jurisdiction.

The Commission made the following finding as to the Secretary's assumption of jurisdiction over yardage charges on direct shipments at other stockyards:

"In the administration of the Packers and Stockyards Act, the Secretary of Agriculture has asserted jurisdiction of yardage charges covering mere egress at many public yards. Orders of the Secretary prescribing the charges for this service at three public stockyards have been sustained in court proceedings. See *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38; *Denver Union Stock Yards Co.* v. *United States, supra; Union Stock Yards Co. of Omaha* v. *United States*, 9 Fed. Supp. 864. The yardage charges now applicable at the public stockyards at St. Joseph, Mo., Denver, Colo., and Omaha, Nebr., for use of facilities and services of the yard companies in connection with egress for direct shipments consigned to packers are those prescribed by the Secretary." (R. 53, 54)

Swift seeks to distinguish these decisions of the Secretary by alleging that the charges fixed by the Secretary at Denver, Omaha, and St. Joseph were "charges covering a complete stockyard service of holding, feeding, watering, placing in commission men's pens, etc." and that the removal of direct shipments was not involved. (Brief, p. 38) In so arguing, Swift is in error on the facts, as will appear by reference to those decisions.

The rate schedule ordered into effect by the Secretary in *Secretary of Agriculture* v. *Denver Union Stock Yard Co.*, B. A. I. Dkt. No. 450, provided expressly that "yardage will be charged as shown below: * * * (3) on livestock consigned direct to packers and slaughterers." (Ex. 41, p. 79) Those charges, like the charges at Chicago, cover every animal received at the yards without exception. Swift says that a "complete yardage service" was given on each animal and that this was shown because "the Secretary prescribed the same yardage rates" on market stock and on direct shipments. (Swift's Appendix, p. 80) The Secretary's report is explicitly to the contrary. The report states that the only direct shipments at Denver were hogs. (Ex. 41, pp. 69–70, 77) The tariff prescribed by the Secretary set a yardage charge of six cents per head on direct ship-

ments of hogs, as compared with twelve cents per head on the hogs consigned to the market. (Ex. 41, p. 79) These facts also appear in the opinion of this Court in which the Secretary's order was sustained. *Denver Union Stock Yard Co.* v. *United States*, 304 U. S. 470, 474 (1938). It may be mentioned that even if the facts had been as Swift incorrectly states them, *i.e.*, if the charges on directs and market stock had been uniform, the tariff of the Denver Union Stock Yard Company would have been identical with that in effect at Chicago.

In *Secretary of Agriculture* v. *Union Stock Yards Co. of Omaha*, B. A. I. Dkt. No. 344, the Secretary prescribed yardage charges on direct shipments in the same way as at Denver, setting the charges at half the amount of the yardage charges on the market livestock. (Ex. 42, last page, order of Oct. 6, 1937) Swift is in error in stating to the Court that the yardage charges on these two kinds of shipments were identical. (Swift's Appendix, p. 82) It may also be noted that the portion of the Secretary's opinion which is quoted by Swift shows on its face that it refers to livestock which has been purchased on the market at the stockyards, and not to direct shipments.

Referring to the third decision of the Secretary (*Secretary of Agriculture* v. *St. Joseph Stock Yards Co.*, B. A. I. Dkt. No. 298, Ex. 43 in this record), Swift says that the decision "makes no mention anywhere of direct shipments to packers." (Swift's Appendix, p. 79) Contrary to Swift's statement, the decision reads as follows:

> "22. Some livestock comes to the stockyard consigned directly to packers and other users under circumstances such that it is not sold in the stockyard. The yardage charges detailed above are assessed against this livestock and imposed upon the person who causes it to come to the stockyard.
>
> 23. It is evident that the theory upon which the schedule of rates and charges is constructed is that whosoever causes

livestock to come to the stockyard shall pay yardage charges, which are in effect an entrance fee * * *." (Ex. 43, p. 9)

Moreover, the Secretary's order of April 13, 1938, expressly specified yardage on livestock "consigned direct to packers" at charges varying from one-third to one-half the yardage charges on the market livestock. (Ex. 43, last page) Swift's characterization of this decision of the Secretary as containing no reference to direct shipments, and its comments about the other decisions in which the Secretary has taken jurisdiction of the yardage charges on direct shipments are complete departures from the facts. If Swift and Armour believe that the yardage charges on direct shipments which are contained in the Yard Company's tariff filed with the Secretary are unreasonably high, and can prove their case, the Secretary has jurisdiction to order a reduction of those charges, and the cases just discussed show that he stands ready to exercise it.

Respectfully submitted,

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